Supreme Court, U.S.
FILED
04-842 DEC 16 2004
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

MARC E. BACON, et al.,
Petitioners,

v.

HONDA OF AMERICA MANUFACTURING, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Sixth Circuit err in holding that no court may ever certify an employment discrimination class that conforms to the liability standard established in *Watson v. Ft. Work Bank & Trust* and 42 U.S.C. § 2000e-2(k)(1)(B)(i) for subjective selection systems, thereby not only misapplying an important element of federal law, but also placing the Sixth Circuit in a conflict with the Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits and creating a safe harbor for employers in the Sixth Circuit who make subjective discriminatory selection decisions?

Did the Sixth Circuit err in holding that a court can never apply the pattern or practice method of proving race discrimination in an individual case, a standard that would have barred individual desegregation plaintiffs from relying on an institution's pattern or practice of racial segregation and its statistically significant disparate impact results, thereby conflicting with this Court's *Swierkiewicz* and *Furnco* decisions and with a decision of the Eleventh Circuit, thus making an employer's pattern of subjective decision making immune from individual challenge?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Marc Bacon and Terry Harden are class representatives and individual plaintiffs. They are black production workers at two plants owned and operated by Honda of America Manufacturing, Inc. (Honda). They have worked in the lowest level production job at Honda since being hired in 1988, despite seeking promotion virtually every year since 1990.

Honda operates four manufacturing plants in the state of Ohio, which produce motor vehicles, engines, and components. Honda is owned in part by Honda Motor Co., Ltd., which is a publicly held corporation.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit in Case No. 01-3520 is reported at 370 F.3d 565 (6th Cir. 2004) and reproduced at Appendix B, pp. 3a-28a. The Sixth Circuit's denial of Appellants' Petition for Rehearing *En Banc* is reproduced at Appendix A, p. 1a. The decision of the United States District Court for the Southern District of Ohio denying class certification is reported at 205 F.R.D. 466 (S.D. Ohio 2001) and reproduced at Appendix C, pp. 29a-81a. The decision of the United States District Court for the Southern District of Ohio granting summary judgment to Honda is unreported and is reproduced in Appendix D, pp. 82a-171a.

JURISDICTION

The Sixth Circuit issued its final decision denying rehearing *en banc* on September 17, 2004. App. A, p. 1a. This Petition for Certiorari is timely in that Petitioners have filed it within 90 days of that date. The Sixth Circuit Decision challenged in this Petition was issued on May 27, 2004. App. B, pp. 3a-28a. The Court has jurisdiction to review the decision of the Sixth Circuit by writ of certiorari, pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

This case involves the interpretation and application of 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* - specifically 42 U.S.C. §§ 2000e-2(k)(1)(B)(i), 2000e-2(a)(1), 2000e-2(m), and 2000e-5(f)(1), Fed. R. Civ. P. 23(a)(2), 23(a)(3), 23(b)(2), and 23(b)(3), which are reproduced at Appendix E, p. 172a.

STATEMENT OF THE CASE

I. Overview of the Case

The original complaint in this case was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 *et seq.* (Title VII); 42 U.S.C. § 1981, Ohio Rev. Code § 4112.02 *et seq.* The basis of Jurisdiction in the United States District Court, the court of first instance, is 28 U.S.C §§ 1343(3) and (4), 42 U.S.C. § 2000e-5, 42 U.S.C. § 1981, as well as the Court's supplemental jurisdiction over Petitioners' state law claims pursuant to 28 U.S.C. § 1367.

This class action case challenges the racially discriminatory impact of Honda's highly subjective promotion system, dominated by 97% white male officials and managers, which provides managers virtually unbridled discretion to deny promotions. Since Honda began operations in the State of Ohio in the early 1980's, it has systematically excluded blacks from promotion opportunities. Honda hired primarily white males in the rural areas where Honda's plants were located, using a hiring system by which employees referred their acquaintances. These white males moved into management ranks and enjoyed continued seniority. When Honda was forced to expand its hiring opportunities to black workers by a 1988 EEOC Conciliation Agreement, it segregated them into the lowest level jobs and systematically excluded them from advancement. Honda maintains a company-wide glass ceiling for blacks, stratifying jobs by race and systematically excluding blacks from positions of responsibility that lead to the top echelons of the company, which are exclusively populated by non-black employees. Honda maintained no strict job paths or promotion paths. Employees moved from production to non-production departments and from nonexempt to exempt jobs at the will of

Honda management. The key element in decision making was favoritism, which resulted in a statistically documented adverse impact toward black workers. Honda's highly subjective promotion system was referred to informally by employees, consultants, and Honda managers alike as the "Buddy System."

Petitioners proved that Honda's subjective employment practices caused a statistically significant adverse impact on its black employees through the testimony of Dr. James McClave, a statistical expert whose qualifications were not disputed; Dr. Philip Way, an expert in the fields of economics and human resource management; Honda business records, including survey results and study results formulated by Honda's expert consultants and by Honda officials; the testimony of numerous class members; and the deposition testimony of Honda officials.

Petitioners' statistical evidence of race discrimination was overwhelming. Dr. McClave determined that Honda segregated its jobs by race, placing most blacks in stereotypical roles in the lowest company ranks. Starting with the presumption of race neutrality and using accepted statistical tests, he determined how many "standard deviations" existed in each analysis. He established that, when the measurement reaches 3 standard deviations, the odds are 99.9% against the event occurring in a race-neutral setting. Standard deviations measured at Honda far exceeded this number. Black under-representation in the category of Officials and Managers equaled 10.2 standard deviations. The relevant labor market percentage of executive-level blacks was more than triple that of Honda during the 1990-1998 period (7.1 standard deviations). During the period July 1994 through June 1999, non-blacks were more than twice as likely to be promoted than blacks (nearly 6.85 standard

deviations). Narrower comparisons of the percentage of promotions awarded to nonexempt employees (8.6 standard deviations) and to production workers only (7.49 standard deviations) yielded the same result. The percentage of promotions awarded from nonexempt to exempt positions (4.42 standard deviations) was also highly statistically significant in favor of whites. Dr. McClave opined that these results indicate it is impossible to attribute the difference in promotion selection to race-neutral decision-making.

Honda's internal Workforce Composition Reports, prepared monthly, counted low level production workers who had been employed at least 18 months and had expressed interest in promotion and those who had been promoted. Examining each plant for each month for each year during a three-year period, Dr. McClave found that Honda's promotion process was "out of control," statistically significantly negatively impacting black production workers nearly every month. Dr. McClave also analyzed a database created by Honda specifically for the class certification hearing, which was limited to five departments for the period 1995-97. He found Honda promoted a statistically significant higher percentage of non-blacks over the entire period and for each year in the Honda-created data. He concluded that "at every step of the promotion process Honda applies 'criteria' and 'tests' that uniformly and statistically significantly reduce the number of blacks, so that the final result is that blacks receive far fewer promotions than would be expected in a race-neutral setting."

Honda management was put on notice that its subjective selection practices resulted in the unfair treatment of minorities through the information set forth in Congressional Hearings in 1991, Honda's 1994 "Respect for the Individual" survey results, its 1994 "Promotional Guideline Survey"

results, its 1995 "Associate Satisfaction Survey" results, its 1996 "Certain Minorities Issues" study, its 1998 "TL/PS Promotion Project Document," its EEO-1 reports to the Equal Employment Opportunity Commission, its Workforce Composition Reports containing statistical analyses, and by discrimination complaints made to top management officials by individual black employees.

The evidence established that there has never existed a method by which an employee could apply for a specific Honda job. Prior to 1998, there was no application process for a promotion. Employees could only state their interest in promotion on their annual performance reviews or orally inform their managers, options Petitioners consistently followed for many years. Openings for exempt and nonexempt jobs were never posted prior to May 2000, so that only a select few employees were aware of upcoming vacancies.

Petitioners produced evidence of the following subjective mechanisms of discrimination: Honda's practice of downgrading blacks on their annual performance evaluations; Honda's practice of providing supervisors complete discretion to apply discipline, which resulted in ineligibility for promotion (Dr. McClave found 14 standard deviations in the application of Honda's discipline to blacks compared to whites); Honda's subjective application of an apparently objective attendance requirement, by which the supervisor was given discretion to use an employee's attendance record as a basis for applying discipline and could expunge attendance violations; Honda's subjective application of an apparently objective requirement that an employee work in a department 12 months before he can be promoted, which was applied disproportionately in favor of white employees (Honda transferred black employees to another department

thereby preventing their promotion for 12 months, while the 12-month requirement was disproportionately ignored in favor of white employees measured at 5.2 standard deviations); Honda's use of interviews by white managers to select individuals for promotion; and subjective test questions. The combination of these subjective mechanisms provided a menu from which Honda management could chose various means to prevent blacks from advancing.

II. Proceedings Below

The trial court denied class certification based on a narrow and incorrect interpretation of a footnote in this Court's decision in *Gen. Tel Co. v. Falcon.*[1] It ruled that a class action based on company-wide discriminatory subjective selection practices that have a disparate impact on blacks cannot be certified as a class action unless the practices are "entirely" subjective. 205 F.R.D. at 477. The trial court held that Petitioners "arguably established commonality in regard to some of their disparate impact claims," 205 F.R.D. at 479, but did not establish commonality with respect to their disparate treatment claims. *Id.* It held that Petitioners did not satisfy the typicality requirements of Rule 23 because there were different decision makers in different departments, different jobs in different departments, and different promotion procedures in different departments, thereby overlooking the commonality and typicality of the Honda's highly subjective selection process. *Id.* at 481. It found Petitioners were not adequate representatives of a class that included exempt employees, despite the fact that the trial court bifurcated the case and restricted the class certification hearing to nonexempt employees only. *Id.* at 481-82. The

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[1] *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159 n. 15 (1982).

trial court adopted the rationale of the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) and held that an employment discrimination class could not be certified where the plaintiffs sought compensatory and punitive damages. *Id.* at 482-90.

In a separate decision, the trial court granted summary judgment in favor of Honda. It held that the pattern or practice method of proof could not be used in an individual case and applied the *McDonald Douglas*[2] analysis, holding that Petitioners failed to establish their discrimination claims. App. D, pp. 82a-171a.

The Sixth Circuit did not reject the evidence set forth on pages 2-6 above in the "Overview Of The Case." It held it was not necessary to consider the *Allison* rationale. Instead, it adopted the trial court's interpretation of *Falcon*, holding that Honda's excessively subjective selection system could not support a pattern or practice claim because it was not 100% subjective. It attempted to distinguish this Court's contrary holding in *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 989-90 (1988) (and its codification in 42 U.S.C. § 2000-e2(k)(1)(B)(i)) that mixed objective and subjective selection standards should be considered to a be purely subjective system, by observing that *Watson* related to establishment of liability and not to class certification. 370 F.3d at 571-72. It did not discuss the decisions of the Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits, which approved certification of such classes.[3]

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[2] *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

[3] See citations, *infra*, p. 11.

Despite the fact that the district court, at the outset of the litigation sua sponte bifurcated the case, removed three employee class representatives who sought promotions to exempt positions in different departments, and refused to allow class certification proceedings to go forward on exempt practices, the Sixth Circuit held that the two nonexempt class representatives were not adequate to represent a class that included exempt employees. The class certification hearing proceeded with only the two Petitioners, both nonexempt employees, as the class representatives. The lower courts failed to permit Petitioners to substitute other class representatives for those perceived to be inadequate and then denied class certification in part on the basis that nonexempt class representatives could not represent exempt class members.

The Sixth Circuit also affirmed the trial court's grant of summary judgment. It ruled that the two nonexempt Plaintiffs must have their individual claims analyzed under the *McDonnell Douglas* method of proof and could not recover on a disparate impact theory or a theory based on the pattern or practice method of proof.

Despite the fact that both Plaintiffs sought promotions virtually every year of their careers, as documented in their Appeal Brief, the Sixth Circuit resolved material disputed facts and held that they were not eligible for promotion during most of that period. The court failed to recognize that the challenged subjective discriminatory practices affected Petitioners' eligibility and prevented their promotions.

After applying this restrictive view of the law, the Sixth Circuit acknowledged that Petitioners were qualified for promotion, that they had not advanced beyond the lowest employment level after a significant number of years, and

noted that "this situation may require the considered attention of Honda management as a business matter." 370 F.3d at 580.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. Review Is Warranted Because The Decision Is In Direct Conflict With This Court's *Watson v. Ft. Worth Bank & Trust* Decision (Later Codified In 42 U.S.C. § 2000e-2(k)(1)(B)(i)) And With Decisions Of Seven Other Circuits, And Because The Lower Courts Need Guidance On This Issue.

This Court has ruled that different categories of discrimination victims can be combined in the same class if they are affected by the same discriminatory practices. "Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Falcon*, 457 U.S. at 159, n. 15. Subsequently, the Court explained that selection systems combining objective and subjective criteria are to be considered a single subjective selection system:

> However, one might distinguish 'subjective' from 'objective' criteria, it is apparent that ***selection systems that combine both types would generally have to be subjective in nature.*** Thus, for example, if the employer in *Griggs* had consistently preferred applicants who had a high school diploma and who passed the company's general aptitude test, its

> selection system could none the less have been considered 'subjective' if it also included brief interviews with the candidates.

Watson, 487 U.S. at 989-90 (1988) (Emphasis added). The Civil Rights Act of 1991 amended Title VII to ensure that courts would follow *Watson* and consider the combination of subjective practices in their disparate impact analyses. *See* 42 U.S.C. §2000e(k)(1)(B)(i); H.R.Rep. No. 102-40(I), at 36 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 694.

Other federal circuits that have considered this issue have applied the *Watson* rule. The Ninth Circuit Court of Appeals, for example, has approved a "broad and diverse" class that "encompasses some 15,000 [black] employees, from a wide range of positions both salaried and hourly, who are employed at Boeing facilities located in 27 different states. *Staton v. Boeing Company*, 327 F.3d 938, 953 (9th Cir. 2003). It found that the class was united by "a complex of company-wide discriminatory practices against African-Americans." *Id.* at 953. Like the Buddy System in the instant case, the *Boeing* case challenged the "old-boy" culture at Boeing that encouraged white supervisors to promote their family and friends through a promotion system that did not require job openings to be posted, under which blacks were disciplined more harshly than whites and internal company surveys and statistical analyses documented the discriminatory results. Other circuits, including the Sixth Circuit, have certified similar classes when the diverse selection systems in different departments were highly subjective like that at Honda, but not 100% subjective. *See Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147 (2d Cir. 2001); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972); *Pettway v. American Casts Iron Pipe*, 494 F.2d 211 (5th Cir. 1974); *Rowe v. General Motors Corp.*, 457

F.2d 348 (5th Cir. 1972); *Senter v. General Motors*, 532 F.2d 511 (6th Cir. 1976), *cert. denied*, 429 U.S. 870 (1976); *Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976); *United States v. N.L. Indus.*, 479 F.2d 354 (8th Cir. 1973); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Theissen v. General Electric Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001).

The Sixth Circuit's reliance on *Falcon* is misplaced. The claim in the instant case is a far cry from the hypothetical estimate in *Falcon*, a case involving only one named plaintiff who could not identify others subjected to the same allegedly discriminatory treatment. In the instant case, a detailed statistical analysis of Honda's employee database identified company-wide race discrimination practices. Declarations and depositions were submitted involving numerous exempt and nonexempt employees affected by Honda's subjective Buddy System. Honda's own surveys and commissioned studies document its institutional problems with race discrimination in promotions. The named plaintiffs and class members share the contention that discriminatory practices at Honda are widespread and entrenched.

The hypothetical class in *Falcon*'s footnote fifteen is broader than the class defined in the instant case, because it combines employees with applicants and it alleges discriminatory hiring in addition to discriminatory promotions. The footnote obviously was inserted to "present a demonstrative example rather than a limited exception to the overall skepticism toward broad discrimination class actions." *Staton*, 327 F.3d at 955. *Falcon* does not generally ban all broad classes based on selection procedures that are not 100% subjective, but rather precludes a class action that, on the basis on one form of discrimination against one plaintiff, seeks to adjudicate all forms of discrimination against all

members of a protected group. *See* 327 F.3d at 955. Petitioners introduced evidence that the same subjective selection criteria were applied company-wide at both exempt and nonexempt levels below the top management levels.

Although the lower courts had the right to review satisfaction of commonality and typicality requirements of Rule 23(a), it was improper for them to resolve disputed facts regarding eligibility and application for promotions, thereby advancing a decision on the merits to the class certification stage. *Eisen v. Carlisle & Jacquelin*, 419 U.S. 516, 177-78 (1974). Assuming, arguendo, that Petitioners lacked commonality or typicality[4] or were otherwise inadequate representatives, it was error to fail to substitute these individuals for any named plaintiff deemed to be inadequate. *See United States Parole Commisson v. Geraghty*, 445 U.S. 388, 415-16 n. 8 (1980) (Powell, J., dissenting); Manual for Complex Litigation § 21.26 (4th. Ed. 2004); 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 2:26 (4th Ed. 2002). By denying class certification on these grounds, the Sixth Circuit has created a safe harbor for employers who rely on subjective selection practices.

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[4] Typicality "does not mean that the claims of the class representative[s] must be identical or substantially identical to those of absent class members." 8 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, §24.25 at 24:150 (4th Ed. 2002); *see also In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996).

II. Review Is Warranted Because Prohibiting Petitioners From Establishing The Disparate Impact Of Honda's Discriminatory Pattern Or Practice In Their Individual Cases Conflicts With This Court's *Swierkiewicz*[5] and *Furnco*[6] Decisions, With The Sixth Circuit's Prior Decision, And With A Decision Of The Eleventh Circuit, Thereby Making An Employer's Pattern Of Subjective Decision Making Immune From Individual Challenge And Barring Individual Plaintiffs From Challenging An Institution's Pattern Of Racial Segregation.

In affirming summary judgment against Petitioners, thereby eliminating them as class representatives, the Sixth Circuit improperly required that their claims be analyzed under the procedural method set forth in *McDonnell Douglas*, 411 U.S. 792, and prohibited the pattern or practice method of proof in an individual case.[7] This ruling conflicts with a prior Sixth Circuit decision and with an Eleventh Circuit decision that establish that the pattern or practice method of proof is available in individual discrimination cases. *See Cox*

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[5] *Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002)

[6] *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

[7] In the Sixth Circuit, Petitioners argued in their Reply Brief that the trial court improperly applied the *McDonell Douglas* test to their pattern or practice disparate impact claims. Nevertheless, Petitioners do not concede that there is insufficient evidence from which a trier of fact could find that they meet the *McDonell Douglas* test. In order to reach that conclusion, the lower courts resolved disputed questions of material fact, a practice prohibited at this stage of the case.

v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1559 (11th Cir. 1986); *Lujan v. Franklin Co. Bd. of Educ.*, 766 F.2ds 917, 925-27 (6th Cir. 1985). The Fourth and Fifth Circuits have issued conflicting opinions on this subject. *Compare Evans v. Hartnett Co. Bd. of Educ.*, 684 F.2d 304, 307 (4th Cir. 1982); *Hardy v. Porter*, 613 F. 2d 112 (5th Cir. 1980) and *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 760-61 (4th Cir. 1998); *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343 (5th Cir. 2001).

This Court has long recognized that in a pattern or practice case, the plaintiff must establish "that discrimination was the company's standard operating procedure." *See Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 336 (1977). The burden of proof then shifts to the employer to prove that the plaintiff was not, in fact, the victim of discrimination. *Id.* at 359. *See also Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772 (1976). The employer may overcome this presumption only with clear and convincing evidence that job decisions made when the discriminatory policy was in force were not made in pursuit of that policy. 431 U.S. at 362. The Petitioners in this case are not simply "individual complainant[s] seeking to prove one instance of discrimination." 431 U.S. at 358 n. 44. They have undertaken the greater burden of establishing a pattern or practice of discrimination. Once there is a finding that a pattern or practice of discrimination existed, Petitioners are "in substantially the same position as the *Teamsters* and *Franks* plaintiffs – that is, they had proven that [race] discrimination 'was the company's standard operating procedure,' and they were entitled to the presumption that the complained-of employment practices violated Title VII." *Cox*, 784 F. 2d at 1559.

The *McDonnell Douglas* presumption, which shifts the *production* burden to the defendant, is not the exclusive method of proving discrimination, and its elements are not to be rigidly applied. *Swierkiewicz*, 534 U.S. at 512 (2002); *Furnco*, 438 U.S. at 577 ("The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic."). Prior to the instant case, it had long been the law in the Sixth Circuit that the *McDonnell Douglas* guidelines were not the exclusive criteria for establishing a prima facie case, *see Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1179 (6th Cir. 1983); *Brown v. Packaging Corp. of Am.*, 338 F.3d 586, 590 n. 1 (6th Cir. 2003), and that the pattern or practice method of proof was available, *Lujan*, 766 F.2d at 925-27.

When individual cases are based on a disparate impact theory of proof, "the courts repeatedly have concluded that shifting the burden of persuasion to the defendant is proper in certain circumstances. Primary among the conditions warranting this shift is a finding of either intentional segregative action or a recent history of racial discrimination in a school system." *Evans*, 684 F.2d at 307 (citations omitted). In *Hardy*, the Fifth Circuit found that a consistent pattern of hiring blacks as administrators for black schools and white administrators for white schools established a prima facie case of discrimination in the failure to hire the individual plaintiff, thus shifting to the defendants the burden or proving by clear and convincing evidence that their actions were not racially motivated. 613 F.2d at 114.

Circumstantial evidence has always been a recognized means of proving a discrimination case. A prima facie case is made out by "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion." *Teamsters v. United States*, 431

U.S. 324, 358 (1977). The Sixth Circuit in the instant case correctly recognized that pattern or practice evidence was relevant to an individual discrimination claim, but then improperly restricted that evidence to a *McDonell Douglas* framework. 370 F.3d at 575.

Pattern or practice evidence of discrimination is a form of circumstantial evidence. This Court has "never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (citations omitted). "[C]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Id.* at 100. Circumstantial evidence must be considered as a whole, rather than being weakened by separating it into discrete parts. *Hunt v. Cromartie*, 526 U.S. 541, 548-549 (1999). In denying Petitioners' individual claims, the Sixth Circuit failed to consider the circumstantial evidence in toto; instead they parsed it into separate practices and held that Petitioners were not affected by the individual practices selected by the court. It failed to recognize that the sum of circumstantial evidence may well be greater than its constituent parts. *See Bourjaily v. United States*, 483 U.S. 171, 179-180 (1987). By denying the pattern or practice method of proof to Petitioners, the lower courts denied them the cumulative view of the discriminatory effects of Honda's subjective selection system.

The lower courts' improper resolution of disputed material facts, for example, by the finding that Petitioners were not eligible for promotion for a sizeable percentage of their careers, contributed to its improper application of circumstantial pattern or practice and disparate impact evidence. Like the district court, the Sixth Circuit adopted Honda's version of the facts and rejected Petitioners'

contradictory evidence. The evidence demonstrated that Petitioners were eligible for, qualified for, and properly sought promotions throughout their careers.[8] Assuming, arguendo, that they were ineligible for promotion at any point, the evidence demonstrated that any alleged ineligibility was caused by the challenged discriminatory patterns or practices.

The detailed statistical, documentary, and testimonial evidence presented by Petitioners demonstrated that their inability to advance was due to the disparate impact of Honda's selection system viewed as a whole. The lower courts erred in refusing to consider the cumulative effect of the numerous subjective practices identified by Petitioners[9] as the reason Petitioners could not advance from the lowest position after many years of employment at Honda. Under the pattern or practice method of proof, and under the disparate impact theory of proof, Petitioners did not have the procedural burden of proving they were personally affected by any individual practice. Because Petitioners' evidence created a material issue of fact as to whether the cumulative effect of Honda's discriminatory pattern or practice of highly subjective decision making had a disparate impact on black

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[8] Prior to 1998, there was no application procedure for promotions at Honda. From 1998 forward, only production workers were subject to a process for one specific job: team leader; there remained no application procedure for any other promotions. Petitioner Bacon sought promotions in 1990, 1991, 1992, 1994, 1995, 1996, 1997, 1999, and 2000. Petitioner Harden sought promotions in 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, and 2000.

[9] Some of the challenged practices were set forth by the trial court at 205 F.R.D. 473-74.

employees, it became Honda's burden to prove by clear and convincing evidence that job decisions made with respect to Petitioner's promotion efforts during the time the discriminatory policy was in force were not made in pursuit of that policy. The Sixth Circuit erroneously applied the *McDonell Douglas* formula to these allegations, depriving Petitioners of their pattern or practice/disparate impact claims and making an employer's practice of subjective decisionmaking immune from individual challenge.

CONCLUSION

The Petition for Writ of Certiorari should be granted. The Sixth Circuit's decision, which conflicts with precedent of this Court and decisions of other Circuits, prevents enforcement of the anti-discrimination laws through both the class action device and through individual claims, where company-wide subjective selection systems are disparately impacting black employees. This is a misapplication of established principles of federal law, a recurrent issue on which the lower courts need guidance, and reflects a split in the circuits that requires resolution by this Court to provide uniform guidance to the lower courts.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 01-3520

[Filed September 17, 2004]

MARC E. BACON, ET AL., Plaintiffs-Appellants,	)
v.	)
HONDA OF AMERICA MANUFACTURING, INC., Defendant-Appellee.	)

BEFORE: BOGGS, Chief Judge; GUY, Circuit Judge; and EDMUNDS,* District Judge.

OPINION & ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of

* Hon. Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 01-3520

[Filed May 27, 2004]

MARC E. BACON, et al., Plaintiffs-Appellants,	)
v.	)
HONDA OF AMERICA MANUFACTURING, INC., Defendant-Appellee.	)

Before: BOGGS, Chief Judge; GUY, Circuit Judge; and EDMUNDS, District Judge.*

OPINION

BOGGS, Chief Judge.

Plaintiffs, Marc Bacon and Terry Harden, brought this employment discrimination action against defendant Honda of America Manufacturing, Inc., seeking to represent a class of

* The Honorable Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

all current and former African-American employees at Honda's four manufacturing plants located in central Ohio. Plaintiffs appeal, asking for review of both the denial of class certification and the subsequent grant of summary judgment to Honda on all of plaintiffs' individual claims. Bacon and Harden allege that the company uses discriminatory procedures for promoting employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, 42 U.S.C. § 1981, Ohio Revised Code § 4112.99, and Ohio common law. The district court correctly determined that Bacon and Harden failed to meet the prerequisites for class certification and that they could not show that they were denied promotions for which they were eligible. For the reasons elaborated upon below, we affirm the decision of the district court in its entirety.

I

On August 19, 1999, Bacon and Harden (plaintiffs), who were employed as "nonexempt" production associates (PAs) for Honda, filed a class action complaint, alleging that Honda engaged in a pattern or practice of discrimination against African-American employees by denying them promotions. Relying on both disparate impact and disparate treatment theories to prove liability, plaintiffs sought declaratory and injunctive relief, promotion to desired positions, back pay, and compensatory and punitive damages.

Honda has four manufacturing plants in central Ohio: Marysville Auto Plant (MAP); Marysville Motorcycle Plant (MMP); Anna Engine Plant (AEP); and East Liberty Plant (ELP). These four facilities have various purposes that range from manufacture of Accord and Acura automobiles, to production of Honda motorcycles, to building of engines and other components. In addition, Honda plants have quality

departments, which are responsible for inspecting products coming off the line; purchasing departments; and various administrative offices, such as Human Resources. In all, there are thirty-nine departments at Honda.

Sixty percent of Honda's 12,700 employees are production associates, who are nonexempt[1] employees supervised by team leaders, the first supervisory level. Production staff share this secondary level of authority with team leaders. The next level of management is production coordinator, an exempt[2] position, who reports to an assistant manager or department manager, who in turn reports to a senior manager or plant manager.

In general, production associates may seek promotion to team leader,[3] but only in the department in which they are currently working. Furthermore, an employee becomes eligible for promotion only after meeting minimum requirements for time working both in the department and for Honda in general. In addition, he or she must have a strong attendance record, typically ninety-eight percent or above, and a disciplinary record that shows no counseling by a manager within the past twelve months. Past performance evaluations are also taken into account and some departments require the production associate to pass a trade test and/or to have completed a certain number of special projects. A team leader

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[1] Hourly wage earners entitled to overtime.

[2] Salaried position with no overtime rights.

[3] Until 1992, production associates in MAP Assembly could also seek direct promotion to production staff, who are responsible for special projects and equipment-related tasks. After 1992, they had to become team leaders first.

must be willing to work any shift or to travel. *See Bacon v. Honda of Am. Mfg.*, 205 F.R.D. 466, 471-72 (S.D. Ohio 2001)(giving detailed description of Honda's production facilities and corporate structure).

The motion for class certification was filed in September 2000, and an evidentiary hearing was held in December 2000. On March 7, 2001, the district court denied the motion for class certification, finding that: (1) plaintiffs did not satisfy the requirements of commonality, typicality, and adequacy of representation with respect to the disparate treatment claims under Fed.R.Civ.P. 23(a); (2) the predominance of monetary relief precluded certification of injunctive class under Rule 23(b)(2); (3) requirements for class certification under Rule 23(b)(3) were not met; and (4) Seventh Amendment concerns made bifurcation and certification of certain issues improper, or at least prevented that process from being the most fair and efficient way to litigate the claims. *Id.* at 490.

Honda moved for summary judgment on plaintiffs' individual claims. The plaintiffs filed a Rule 56(f) motion in response, requesting a revised discovery schedule and a new trial date. The district court denied the motion, although it allowed one additional deposition. On April 30, 2001, the district court granted summary judgment to Honda on the individual claims of Bacon and Harden. That order thoroughly addressed each of the plaintiffs' claims under both the disparate impact and disparate treatment theories. This appeal followed.

II

Class Action Certification

This court reviews denial of class action certification for abuse of discretion. *Alkire v. Irving,* 330 F.3d 802, 810 (6th Cir. 2003). In order for one or more litigants to represent all parties in a class, four prerequisites must be met: "(1) the class [must be] so numerous that joinder of all members is impracticable, (2) there [must be] questions of law or fact common to the class, (3) the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class, and (4) the representative parties [must] fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a). In this case the district court conducted the mandatory "rigorous analysis [to confirm] that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. v. Falcon,* 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982). We agree with its conclusion that the disparate treatment claim fails the second, and the disparate impact claim the third, part of the Rule 23(a) test.

Numerosity

There is no automatic cut-off point at which the number of plaintiffs makes joinder impractical, thereby making a class-action suit the only viable alternative. *In re Am. Med. Sys.*, 75 F.3d 1069, 1079 (6th Cir. 1996). However, sheer number of potential litigants in a class, especially if it is more than several hundred, can be the only factor needed to satisfy Rule 23(a)(1). 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 3:5, at 243-45 (4th ed. 2002). The facts of the case guide a court's determination that the class is sufficiently large to make joinder impractical. *Gen. Tel. Co. v. E.E.O.C.*, 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed.

2d 319 (1980). In this case, Bacon proposes a class of some 800 current and former African-American Honda employees, a number well beyond the point that joinder would be feasible. The requirement of Rule 23(a)(1) is met.

Commonality

In order to show disparate treatment, a potential class representative must show that the employer intentionally discriminated against a protected class and that there are questions of law or fact common to the class. *Falcon*, 457 U.S. at 162 (Burger, C. J., concurring in part). The Supreme Court has noted that class certification is "appropriate . . . [when] it is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue." *Califano v. Yamasaki* 442 U.S. 682, 701, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)(upholding class certification for litigation of an issue of interest to all social security beneficiaries). Variations in the circumstances of class members are acceptable, as long as they have at least one issue in common. *In re Am. Med.*, 75 F.3d at 1080 (citations omitted)(reversing a grant of certification because the putative plaintiffs had used many different models of a certain medical device, which had produced a range of side effects, so that the malfunction could not be attributed to a common cause).[4]

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[4] The district court analyzed commonality separately for the disparate treatment and disparate impact claims. The court generously concluded that the clear instances in which Honda's facially neutral policies would not affect the putative class in a uniform manner could be ignored because they were "differences [that] are not critical to a finding of commonality on the disparate impact claim." *Bacon*, 205 F.R.D. at 478. For the purposes of clarity in this opinion, we assume, without deciding, that the district court was correct.

Bacon and Harden were responsible for satisfying the court's concerns related to whether:

> (i) the nature of the alleged unlawful employment practice genuinely had a class-wide impact;
>
> (ii) employment practices affecting the class were uniform or diverse, given factors such as size of the work force, number of plants involved; range of employment conditions, occupations, and work activities; geographic dispersion of the employees and extent of intra-company employee transfers;
>
> (iii) members' treatment would be likely to involve common questions;
>
> (iv) relevant employment and personnel policies and practices were centralized and uniform; and
>
> (v) similar conditions prevailed throughout the time period covered by the allegations.

Stastny v. S. Bell Tel. and Tel. Co., 628 F.2d 267, 277 (4th Cir. 1980)(citing *Harriss v. Pan Am. World Airways, Inc.*, 74 F.R.D. 24, 41 (N.D. Cal. 1977)); Newberg, § 24:21, at 133-34 (requiring a specific showing of underlying facts that might raise an inference of a common pattern or practice through allegations of specific incidents of discrimination, supporting affidavits, or evidence at the class certification hearing).

Bacon and Harden are attempting to certify a class of all African-American workers at Honda's four Ohio facilities over the past twenty years who were involved in the company's promotion system. They assert that "company-wide subjective practices" and "similar promotion criteria"

across departments satisfy the requirements of Rule 23(a)(2). Conclusory allegations and general assertions of discrimination are not sufficient to establish commonality. *Falcon,* 457 U.S. at 157. Plaintiffs failed to show how hourly wage earners and salaried employees would have the same interests, especially in terms of promotion procedures in which at least some of the nonexempt employees would be competing to join the ranks of exempt management. They also did not demonstrate how differing promotion criteria for jobs as diverse as welding, accounting, and engine-building could discriminate against each African-American employee. Nor did they elaborate on why this court should disregard the objective criteria for promotion and find that all African-American employees were harmed by managers "who made subjective decisions."

We hold that plaintiffs have failed to produce sufficient evidence to convince us that the district court abused its discretion in finding that the factors enumerated above had not been met. We view with skepticism a class that encompasses 1) both workers and supervisors; 2) production-line workers and those in administrative positions; 3) workers in four plants with different production capabilities; and 4) workers and supervisors spread over more than 30 departments. Because class members have such different jobs, we find it difficult to envisage a common policy regarding promotion that would affect them all in the same manner.

The only way Bacon and Harden can place such a diverse group under one umbrella is to demonstrate that Honda operated in a discriminatory fashion against all the workers in the class "through an *entirely* subjective decision-making process." *Falcon*, 457 U.S. at 159 n.15. If they can make this showing, then they can establish commonality and typicality. However, Honda's decision-making is not completely

subjective: it also uses objective criteria for promotion, such as time in service, attendance records, and test scores.[5] Bacon and Harden rebut this by citing another Supreme Court case that held that mixed systems for determining promotions would "generally have to be subjective in nature." *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 989-90, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988).

We do not accept the argument that Honda's decision-making process is entirely subjective because, as a matter of fact, it is not. Plaintiffs cannot avoid the heavy lifting of showing eligibility for class certification by conflating two exceptions to separate rules for adjudicating discrimination cases. An entirely subjective decision-making process may, theoretically, allow different kinds of employees to be in the same class - a question of class membership (*Falcon*). For the entirely separate purpose of establishing a *prima facie* case of disparate impact, mixed objective and subjective standards may be considered to be purely subjective (*Watson*). *See* 42 U.S.C. § 2000e-2(k)(1)(B)(i).

The two exceptions are not interchangeable, however. Plaintiffs are trying to demonstrate eligibility for class membership, which is governed by the "entirely subjective" requirement in *Falcon*. They must prove that the potential members of the class actually have something in common: they are subject to random decision-making. As an entirely separate matter, the Court has been cognizant of the difficulties inherent in proving discrimination and therefore set a relatively low bar for establishing a *prima facie* case. *See, e.g., Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S.

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[5] See discussion below in Section III, p. 21, rejecting the assertion that Honda subjectively applied these criteria.

248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)("The burden of establishing a prima facie case of disparate treatment is not onerous."). Therefore, counting mixed criteria as subjective furthers the goal of making sure that valid claims get to a jury. The constructive subjectivity in *Watson* cannot substitute for the actual and complete subjectivity required for the exception in *Falcon* because the cases deal with two unrelated legal issues: class membership and the elements of a *prima facie* case. We hold that the *Falcon* requirement is not met because the plaintiffs have not shown that the wide range of class members are all subject to the same, exclusively-subjective, decision-making process.

Bacon and Harden rely on *Senter v. General Motors Corp.*, but the class in that case was more circumscribed: the class consisted of "all black employees who, during a period between July 2, 1965 and September 1, 1971, were denied an opportunity for promotion to [salaried] supervisory positions [from hourly positions] although possessing seniority and qualifications equivalent to white employees who were so promoted." *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 523 (6th Cir. 1976). In contrast, plaintiffs here want to certify a class of employees who worked at Honda over a period of twenty years in both hourly and salaried positions with different qualifications and varying levels of seniority. *Senter* focused on one transitional step in the career path of the plaintiffs over a six-year period: the jump from hourly wage earner to salaried employee. In contrast, plaintiffs are challenging Honda's practices for all promotions, regardless of department or starting point in the company hierarchy, and regardless of comparability in objective qualifications. Therefore, *Senter* can be distinguished from the facts of this case and does not compel us to find that the commonality factor has been met.

Typicality

Assuming, arguendo, that Honda's promotion procedures had a disparate impact on African-American employees, we hold that neither Bacon nor Harden is a typical member of the class. The typicality requirement is designed "to limit the class claims to those fairly encompassed by the named plaintiff's claims." *Gen. Tel. Co.*, 446 U.S. at 330. In order to meet the typicality requirement, the plaintiffs must show that their "injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff." *In re Am. Med.*, 75 F.3d at 1082 (quoting 1 Newberg, *supra*, at § 3-76). However, their personal choices, independent of any practices by Honda that have a disparate impact, have rendered them ineligible for promotion for the majority of their time at the company. Therefore, Honda can assert legitimate non-discriminatory reasons, or business reasons, for not promoting them, which would not be available as an explanation for discrimination against other African-American employees.

Honda's career track on the production line starts with production associates. The next rung up the ladder is team leader or production staff. From July 1994 to July 1999, 92% of promoted PAs were elevated to team leader or production staff in their home departments. The remaining 8% were promoted to a different type of work, such as quality control or administration. In 1992, MAP Assembly, where both plaintiffs worked for the majority of their tenure, changed its policy to no longer allow promotion directly from production associate to production staff; a line worker would have either to request promotion to team leader, transfer out of the department with the attendant one-year wait for eligibility, or seek promotion to administration or the quality department.

The position of team leader is not inherently desirable: it requires availability for overtime and imposes added responsibility for a marginal increase in pay. Therefore, advancement through transfer to a parallel track is desirable, but, like any career shift, involves overcoming an experience deficit in comparison to other candidates. Both named plaintiffs in this case chose to avoid seeking advancement through becoming a team leader and concentrated on acquiring positions in the quality department or administration. Because this strategy circumscribed their chances for advancement, we hold that they are not typical of African-American workers at Honda.

Bacon started working at Honda in 1988 and was first eligible for promotion in April 1990. He was eligible for 13 months until May 1991, when he transferred to a new department (MAP assembly). In 1993, when there were three promotions to team leader, Bacon was not eligible for consideration because he did not have the 100% attendance required for the position and had not completed an overtime special project (New Honda (NH) Circle) within the last 24 months, another prerequisite. From 1994 - 96, he did not express interest in a production team leader position and so was not eligible for consideration, and he did not take the required test in 1996. He transferred to a new department (MMP Assembly) in 1997, rendering him ineligible for promotion until February 1998. In April 1998, the promotion process was changed: to be considered for elevation to team leader, an employee had to submit a pool interest form, which Bacon never did.

In order to be considered for a position in a non-production department, an employee had to fill out a career interest application (CIA), which was valid for one year. Bacon filled out CIAs in 1991 (during most of which time he

was not eligible for any promotion), 1994, 1996, 1997, and 2000. Selection for interviews under this program was done by blind assessment of the application form. Bacon was selected for interviews on several occasions, including three times in the purchasing department, but not selected because other candidates had stronger educational backgrounds and job-related experience. Four African-Americans and twelve Caucasians were promoted through this process from 1993 - 2000.

Harden was hired in 1988 and became eligible for promotion in March 1990. He expressed interest in promotion to team leader or production staff, which remained a possibility for 15 months, until May 1991, when he requested, and was authorized, to transfer to another department (MAP assembly), making him ineligible for promotion for the next 12 months. In 1993, Harden indicated a desire for promotion to production staff, which was no longer an option due to the change in policy in MAP Assembly, or to the quality department. He was not considered for promotion to team leader because he did not indicate interest; furthermore, he also did not meet the qualification of 100% attendance or participation in overtime special projects required for consideration.

Harden rejected the most obvious path to advancement and was not eligible to be considered for team leader until April 1996, when he indicated that he wanted to take the qualification test. He received a score of 63 on that exam, some ten points below the cutoff, and therefore was not eligible for a team leader position; he did not take the exam in 1997. In April 1998, the promotion process was changed and to be considered for elevation to team leader, an employee had to submit a pool interest form, which Harden did not do. In 1999, he did not see the notification, posted on

September 21, of the October 8 deadline for submitting the requisite interest form to take the qualification test. He heard about the possibility from his wife around October 2, but was out on bereavement leave starting October 3 and did not return until October 21, when Honda determined that it was too late to sign up for the October 25 test. Harden joined this lawsuit on February 18, 2000.

Therefore, largely as a result of his personal promotion preference, Harden was eligible for promotion to team leader for only 15 months out of the ten years at issue in this case. He expressed interest in, and pursued, other avenues of advancement, most notably inclusion in the pool for employment in the quality department. Because he was pursuing a different career track, he was unable to compete with other candidates who had directly relevant experience. Harden was so often ineligible for promotion, particularly for the position of team leader that he was most likely to get, he cannot reasonably represent the interests of those who may have consistently applied for promotion and been turned down for discriminatory reasons.

In sum, to qualify for class certification, all the parts of Rule 23(a) must be met. On their class certification claim based on disparate treatment, plaintiffs cannot demonstrate a common issue of fact or law applicable to every member of the proposed class. On their disparate impact claim, plaintiffs cannot show that the facially neutral policies regarding promotion affected them in a typical way because they opted out of the most common and reliable path of advancement. The plaintiffs cannot meet the requirements of Rule 23(a)(2) and (3) and the district court correctly denied class certification.

We therefore do not consider the Rule 23(a)(4) issue of whether the plaintiffs' attorneys could fairly represent the class due to their involvement in parallel litigation against Honda. In light of the posture of this case, it would be inappropriate for us to address the split between the Second and Fifth Circuits concerning whether monetary damages can be sought in a Rule 23(b)(2) class action suit, and we do not decide any aspect of that question in this opinion. *Compare Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) *with Robinson v. Metro N. Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001). We therefore turn to the plaintiffs' individual claims of discrimination under theories of disparate treatment and disparate impact.

III

Individual Claims

The district court granted summary judgment to Honda on Bacon's and Harden's claims of individual disparate treatment and disparate impact. We review a grant of summary judgment *de novo*. *Pinney Dock & Transp. Corp. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir. 1988). Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

Disparate Treatment

The plaintiffs' claim of disparate treatment is analyzed under the well-known rubic established in *McDonnell Douglas. McDonnell Douglas v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The same basic pattern is used in a claim concerning racial discrimination in promotion; specifically, each plaintiff must show that: (1) he

is a member of a protected class; (2) he applied for and was qualified for a promotion, (3) he was considered for and denied the promotion; and (4) other employees of similar qualifications who were not members of the protected class received promotions at the time the plaintiff's request for promotion was denied. *Nguyen v. City of Cleveland,* 229 F.3d 559, 562-63 (6th Cir. 2000). The district court provided a detailed analysis demonstrating how failure to establish a *prima facie* case warrants summary judgment on the individual claims and we need not belabor the issue, other than to affirm a few critical points of law.

Pattern-or-Practice Method of Proof

The district court found, based on the weight of authority outside the Sixth Circuit, that the pattern-or-practice method of proving discrimination, in which the plaintiff shows that the company had a policy of discriminating against a protected class, is not available to individual plaintiffs. *See, e.g., Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 761 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031, 119 S. Ct. 2388, 144 L. Ed. 2d 790 (1999); *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 711 (2d Cir. 1998). All interpret the Supreme Court's discussion of the pattern-or-practice method of proof as being limited to class actions or suits by the government. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 359-60, 97 S. Ct. 1843 52, L. Ed. 2d 396 (1977). Although plaintiffs argue on appeal that the district court improperly analyzed their pattern-or-practice basis for class certification, they have not specifically challenged the court's finding that the pattern-or-practice method of proof is not available to them on their individual claims.

We therefore hold that the pattern-or-practice method of proving discrimination is not available to individual plaintiffs.

We subscribe to the rationale that a pattern-or-practice claim is focused on establishing a policy of discrimination; because it does not address individual hiring decisions, it is inappropriate as a vehicle for proving discrimination in an individual case. *Lowery*, 158 F.3d at 761 (observing that "[t]he Supreme Court has never applied the *Teamsters* method of proof in a private, non-class suit charging employment discrimination. Rather, the Court has noted that there is a 'manifest' and 'crucial' difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination.")(citing *Cooper v. Fed. Reserve Bank of Richmond,* 467 U.S. 867, 876, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984)). This reading has also been adopted by at least one district court in this circuit. *Herendeen v. Mich. State Police*. 39 F. Supp. 2d 899, 905 (W.D. Mich.1999). However, pattern-or-practice evidence may be relevant to proving an otherwise-viable individual claim for disparate treatment under the *McDonnell Douglas* framework.

Exemption from Application Requirement

As demonstrated above, Bacon and Harden were not eligible for promotion for a sizable percentage of their tenure at Honda, and/or did not apply to be in the available promotion pools, as required in part two of the test for a *prima facie* case. They now argue that they should be exempt from such a requirement because, given the discriminatory nature of promotions at Honda, such an application would have been futile. Although it is true that failure to apply for a promotion may be excused, the circumstances must reveal "overwhelming evidence of pervasive discrimination in all aspects of [the employer's] internal employment practices, and [that] . . . any application would have been futile and perhaps foolhardy." *Harless v. Duck,*, 619 F.2d 611, 617-18 (6th Cir. 1980)(quoted in *Kreuzer v. Brown*, 128 F.3d 359,

364 n.2 (6th Cir. 1997)). Plaintiffs cannot come close to meeting this standard. Not only did other African-Americans receive some of the promotions for which the plaintiffs applied, but Bacon's supervisor expressed willingness to help him in his application to the purchasing department. Nor was the application process arduous; in most cases, all the plaintiffs had to do was fill out a form expressing interest. It is not unreasonable to expect plaintiffs to make such a minimal effort to preserve their rights.

Plaintiffs also rely on the holding in *Mauro v. Southern New Eng. Telcomms., Inc.*, 208 F.3d 384, 386-87 (2d Cir. 2000), that the application requirement did not apply when the plaintiff expressed interest in promotion to a class of positions but was unaware of specific positions because they were not posted. *See also Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1022 (6th Cir. 2000)(recognizing exception to application requirement when employer does not notify employees of available promotion and does not provide formal mechanism for expressing interest in promotion). Although each production department only posted its promotion opportunities internally, the requirement of one-year's tenure in the department meant that all those eligible to respond had access to the announcement. Although it is true that submitting an application to the quality department and non-production pools was not tantamount to applying for a specific job, managers conducted a blind review of all eligible candidates, not knowing name, background, or racial profile. Those who were deemed qualified were then put in a pool and interviewed as vacancies occurred. Therefore, we see no basis for waiving the general requirement that a plaintiff must have applied for a position in order to assert that he was denied the position because of discrimination.

Disparate Impact

Disparate impact analysis is used when an employer's facially neutral policy adversely affects a protected class. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971). To show disparate impact, it is not necessary to show an intent to discriminate, but the plaintiff must demonstrate a connection between the challenged practice and the resulting disparities between protected and non-protected classes. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989)(clarifying that the "plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack"). Generally disparate impact analysis is used in a class action, but it may also form the basis of an individual claim. *See Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1048 (6th Cir. 1998)(ADEA context). The district court determined that basic requirements of standing mean that an individual plaintiff must show that the facially neutral policy resulted in discrimination that resulted in personal injury. *Coe v. Yellow Freight System, Inc.*, 646 F.2d 444, 451 (10th Cir. 1981). *See also Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1016-17 (1st Cir. 1984); *Carpenter v. Bd. of Regents of Univ. of Wis. Sys.*, 728 F.2d 911, 915 (7th Cir. 1984). Plaintiffs have not challenged this conclusion.

In *Warth v. Seldin*, the Supreme Court explained the basic principles of standing, which mandate that a plaintiff have a "personal stake in the outcome of the controversy" and that the plaintiff must have suffered some real or threatened injury. *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)(quotation marks and citation omitted). From these basic principles, it is natural for us to hold that an individual plaintiff arguing a disparate impact

theory must show that the challenged policy directly disadvantaged him in some fashion. *See Bowdish v. Cont'l Accessories, Inc.*, 1992 U.S. App. LEXIS 14315, No. 91-1548, 1992 WL 133022, at *5 (6th Cir. June 12, 1992) (noting an "individual plaintiff in an employment discrimination case must present some evidence that demonstrates that his or her *individual* discharge was the result of discrimination") (unpublished opinion) (citing *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1253 n.8 (7th Cir.1990)).

Bacon and Harden contend that Honda's requirements for attendance, time in department, testing, and overtime activities in determining eligibility for promotion disproportionately disadvantage African-Americans. Whatever the validity of those disparate impact claims, and the statistical evidence is complex and heavily disputed, we agree with the district court that the plaintiffs cannot show that the policies injured them personally, and therefore their claim must fail.

Attendance

Plaintiffs' expert found that more African-Americans than other employees were noted as being late or absent. Plaintiffs claim discrimination in "excusing" the absences, resulting in more African-Americans being ineligible for promotion due to Honda's stringent attendance requirements. Plaintiffs overlook the fact that the basic attendance records are generated by computer time clocks. Employees may expunge the record of tardiness or absence by applying personal or vacation time to make up for the missing time. We have no explanation for the fact that fewer African-Americans chose to use their vacation time to make up for being late or unexpectedly absent, but see nothing in the record to indicate that disparity is the result of discrimination.

The only possible theory would be that Honda somehow induced blacks to be late more often than other employees in order to force them to deplete their vacation time until the point that they would opt to keep the attendance deficit on their records. Plaintiffs do not allege that the computers were somehow programmed to mark African-Americans as late, however, and we cannot think of any other way in which Honda even theoretically could create this difference.

Once the plaintiff establishes that a facially neutral policy has an adverse effect on a protected class, the burden of production and persuasion shifts to the employer to show that the challenged practice is a business necessity. *United States v. City of Warren*, 138 F.3d 1083, 1091-92 (6th Cir. 1998). Therefore, even if we were to find a connection between the attendance policy and promotion opportunities for minority workers, Honda certainly has a legitimate business reason for demanding near-perfect attendance from its employees. Plaintiffs could rebut this by offering an alternative that would not have the discriminatory impact but would nevertheless serve the employer's legitimate interests. *Wards Cove*, 490 U.S. at 660. Bacon and Harden have not offered another system for making sure that the production line is always sufficiently staffed.

Nor have Honda's attendance requirements injured the plaintiffs; both men have generally maintained attendance records that would not have prevented them from being promoted. Bacon was counseled for not meeting the required 98% attendance level in 1997 but not at the managerial level. An employee is ineligible for promotion for one year after a managerial-level counseling, but a similar session with a lower-level supervisor does not preclude advancement. Even if Honda management abused the system by disproportionately counseling African-Americans at the

managerial level, neither Bacon nor Harden was subjected to this treatment and therefore cannot raise it as part of an individual disparate impact claim.

Time in Department

Honda requires every employee to work at the company for 18 months before being eligible for promotion. In addition, an employee must give up the right to promotion for 12 months after transferring from one department to another. Plaintiffs' statistical expert found a disparity between African-Americans and other employees in number of transfers and therefore they posit that this is a discriminatory requirement designed to keep African Americans off the promotion roster. We agree that a documented record of *forced* transfers of African-American employees would raise an inference of discrimination, but there is no evidence of that. The vast majority of transfers were requested by employees themselves, including both Bacon and Harden, in order to get a more desirable shift or position themselves for advancement. Employees involved in departmental reorganizations or assigned to special projects kept their departmental seniority. Dr. McClave, plaintiffs' statistical expert, did not distinguish between requested and other transfers in his analysis. The record gives no explanation for why African Americans might be more likely to request transfer, but that is a question for Honda management rather than this court. In terms of percentage, the difference between the percentage of African Americans in Honda's workforce (7.8%) and the percentage of African Americans requesting transfer (8.69%) does not diverge markedly.

The statement in plaintiffs' brief that "[t]ransfers were used to disqualify Bacon and Harden from certain promotions" is misleading. Appellant Br. at 17. Both men

requested transfer, knowing the consequences in terms of promotion eligibility. Honda has a legitimate business reason for requiring familiarity with procedures and skills of a particular department before allowing promotion within that department. Under the burden-shifting pattern cited above, Bacon and Harden would have to propose a different method for ensuring familiarity with department techniques and procedures for those eligible for promotion, which they do not do. The periods of ineligibility for promotion resulting from their requested transfers cannot be attributed to discrimination on the part of Honda.

Testing

At certain periods and in certain departments, Honda required testing to demonstrate sufficient knowledge to be eligible for promotion. Bacon and Harden allege that this testing resulted in discrimination. However, nothing in the record demonstrates that the tests resulted in a widely divergent pass rate for blacks and whites or that the subject matter of the tests was not business-related. Without such a showing, there is no basis for a disparate impact claim. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975); *United Black Firefighters Ass'n v. City of Akron,* 1996 U.S. App. LEXIS 8011, No. 94-3961, 1996 WL 125043, at *2 (6th Cir. 1996)(unpublished opinion). Furthermore, Bacon passed the test that he took. Harden received a score of 63 on the team leader test, at a time when the cutoff for consideration was in the mid-70s, but passed other assessments to be eligible for promotion into the quality department.

The brief submitted on behalf of Bacon and Harden also alleges that they were "prevented from taking eligibility tests." Appellant Br. at 53. This is an overstatement. Harden

missed the October 8, 1999 deadline to express interest in the October 25 sitting of the test. He was on bereavement leave, starting after October 3, and returned a few days before the test was administered. As a matter of business judgment, it might have been better for Honda to show some flexibility given Harden's difficult personal circumstances, but it was under no obligation to ignore the fact that Harden had not complied with the deadlines, which he knew about even before his sister's death. The record is vague on Bacon's reasons for not sitting for the test; in his deposition he merely states that he "has not had the opportunity to do so." If Honda had actively prevented him from doing so, his deposition testimony would have been more specific.

NH Circles

Neither Bacon nor Harden participated actively in the overtime special projects that Honda regarded as the final prerequisite for consideration for promotion. The two may have had entirely legitimate reasons for doing so; in fact, Bacon at one point was attending college classes at night and therefore was not available. Nevertheless, Honda had a legitimate business reason for gauging commitment to the company by willingness to make an extra, compensated effort. In fact, the team leader position required availability for overtime, so this policy was an effective way of making sure that an employee was actually willing to put in extra hours. An employer cannot be held liable for disparate impact if a legitimate business policy results in workforce disparities. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989). Plaintiffs fail to suggest another equally effective system for Honda to allow employees to signal their willingness to put in the extra effort that makes them strong candidates for additional responsibility and compensation.

IV

Discovery

In January 2001, in response to Honda's motion for summary judgment, the plaintiffs sought further discovery on the merits of plaintiffs' individual claims under Federal Rule of Civil Procedure 56(f). Plaintiffs argued, as they do on appeal, that discovery had been focused on, and limited to, class certification issues. The district court denied the motion, stating that the discovery and scheduling orders "never indicated that the parties should not be proceeding with the merits discovery as well as the class certification discovery, with the exception of the magistrate judge's discovery order of October 20, 2000, which states that the parties should not 'be conducting discovery that is unrelated to the motion to certify during November and up to December 18." Plaintiffs were nonetheless permitted to depose Rick Gardner, the only individual who plaintiffs specifically asked to depose, and to supplement their response to the motion for summary judgment. The district court also observed that much of the voluminous record submitted at the class certification hearing also related to the individual claims of the plaintiffs.

We review a denial of discovery for abuse of discretion. *Hahn v. Star Bank,* 190 F.3d 708, 719 (6th Cir. 1999). Given that the record in this case exceeds 3,800 pages and that the elements of Bacon and Harden's individual claims are directly related to their class action claims, we are hard put to imagine what further discovery would have accomplished in this matter.

V

It is unfortunate when two qualified minority workers with strong work evaluations spend a significant number of years at a company and do not advance. This situation may require the considered attention of Honda management as a business matter. However, based on the record before us, the district court did not err in its rulings. Therefore we **AFFIRM** the district court's denial of class certification and grant of summary judgment to Honda.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C2-99-803

[Filed March 7, 2001]

Marc Bacon, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
Honda of America Mfg., Inc.,	)
Defendant.	)
	)

BEFORE: James L. Graham, United States District Judge.

OPINION AND ORDER

Graham, J.

This is an employment discrimination action filed by plaintiffs Marc Bacon and Terry Harden against defendant Honda of America Manufacturing, Inc. (hereinafter "Honda" or "the defendant"). Plaintiffs Bacon and Harden, who are employed as production associates at Honda, allege that the defendant has engaged in a pattern and practice of discrimination against African-Americans by denying them

favorable positions, skilled positions, transfers and promotions, through the operation of a "buddy system," and through the use of both objective and subjective employment criteria in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, 42 U.S.C. § 1981, Ohio Revised Code § 4112.99, and Ohio common law. The plaintiffs rely on both the disparate impact and disparate treatment theories of liability. The plaintiffs seek declaratory and injunctive relief, promotion to desired positions, the implementation of sensitivity training, an employee grievance system and an equal employment opportunity program under the supervision of a court-appointed expert for two years, compensatory damages, punitive damages and back pay.

On September 29, 2000, the plaintiffs filed a motion for class certification of their claims pursuant to Fed.R.Civ.P. 23.[1] The court conducted an evidentiary hearing on this motion from December 18, 2000, through December 21, 2000.

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[1] The plaintiffs were granted leave on July 19, 2000, to file a second amended complaint adding Mizella Bailey, a non-exempt Production Staff employee, and exempt employees Donald Taylor and Sherman Manuel as additional named plaintiffs and class representatives. However, in an order filed on October 13, 2000, this court stayed any further proceedings on the second amended complaint pending this court's decision on the motion for class certification. Thus, the issue of class certification presently before the court is limited to whether a class may be certified with the original named plaintiffs, Bacon and Harden, as class representatives.

I. Miscellaneous Pending Motions

Prior to addressing the plaintiffs' motion for class certification, the court will note on the record its rulings on several other motions which were filed prior to the class certification hearing. The plaintiffs' motion of September 15, 2000 (Docket # 86) for leave to file a surreply to the defendant's reply memorandum in support of it's appeal of the July 11, 2000 order of the magistrate judge is granted. Defendant's motion of October 20, 2000 (Docket # 101) for leave to file a memorandum in opposition exceeding twenty pages is granted. Defendant's motion of November 16, 2000 (Docket # 107) for leave to supplement its exhibits to the memorandum contra the motion for class certification is granted. The plaintiff's motion filed on December 5, 2000 (Docket # 118) for leave to file corrected exhibits to the motion for class certification is granted.

On December 4, 2001, the defendant filed a motion (Docket # 117) to strike portions of the plaintiffs' reply brief to the defendant's memorandum contra the motion for class certification, or in the alternative, for leave to file a supplemental memorandum in opposition. The defendant's motion to strike is denied, and the defendant's motion for leave to file a supplemental memorandum in opposition is granted. The plaintiffs' December 6, 2000 motion (Docket # 121) to strike the defendant's motion (Docket # 117) is denied.

The defendant filed a motion *in limine* (Docket # 116) on December 4, 2001 seeking to exclude evidence from the class certification hearing. Specifically, the defendant seeks to exclude: (1) certain survey evidence concerning perceptions of discrimination at Honda; (2) the "Glass Ceiling Report", which did not specifically concern Honda; (3) certain 1991

Congressional hearing testimony concerning employment discrimination, which included a reference to Honda as being a company committed to nondiscriminatory practices; (4) evidence relating to the 1991 Management Development Project, in which upper-level management employees at Honda were interviewed concerning topics other than race discrimination; (5) a memorandum entitled "Certain Minority Issues" which was prepared by a public relations firm regarding the. perceptions of persons outside Honda regarding the existence of race discrimination at Honda; and (6) the 1988 conciliation agreement between Honda and the Equal Employment Opportunity Commission ("E.E.O.C.").

The various surveys were referred to during the class certification hearing. The court will deny the motion *in limine* with respect to these surveys and will consider this evidence for whatever it is worth as bearing on the issue of class certification. Items (2) through (6) are not relevant to the issue of class certification currently before the court, and the motion *in limine* is sustained as to these items.[2] In so ruling,

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[2] The surveys in question constitute or are analogous to reputation evidence, which is not a specific employment practice and is not admissible to establish a claim of discrimination, particularly where, as here, there is no evidence that the employer deliberately created or fostered its reputation as a discriminator to somehow further its policies of discrimination. *See E.E.O.C. v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1280-81 (11th Cir. 2000). The 1988 conciliation agreement is also arguably barred from being used as evidence under 42 U.S.C. § 2000e-5(b), which provides in relevant part: "Nothing said or done during and as part of such informal endeavors may be ... used as evidence in a subsequent proceeding without the written consent of the persons concerned." *See Equal Employment Opportunity Commission v. Akron Nat'l Bank & Trust Co.*, 497 F. Supp. 733, 737 (N.D.Ohio 1980).

the court has made no determination concerning whether this evidence would be admissible at trial.

The defendant has moved for an order excluding the expert testimony of James McClave and Philip Way (Docket # 113). In a motion filed on December 1, 2000 (Docket # 114), the plaintiffs moved to strike the defendant's motion to exclude expert testimony. The plaintiffs' motion to strike is denied.

In its motion for the exclusion of expert testimony, the defendant requests this court to conduct a preliminary inquiry into the admissibility of this evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and Fed.R.Evid. 702. Although at least one court has found that the Federal Rules of Evidence apply to proceedings under Rule 23, *see Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989)(evidence rules apply to fairness hearing under Fed.R.Civ.P. 23(e)), other courts have concluded that on a motion for class certification, the evidentiary rules should not be strictly applied. *See In re Hartford Sales Practices Litigation*, 192 F.R.D. 592, 597 (D.Minn. 1999)(declining to address admissibility of exhibits at class certification hearing); *Thompson v. Board of Educ. of Romeo Community Sch.*, 71 F.R.D. 398, 401-02 n. 2 (W.D.Mich. 1976)(concluding that evidence rules not binding in preliminary matters such as class certification, particularly where documentary evidence was not challenged as inaccurate, but only that necessary foundation had not been laid), *rev'd on other grounds*, 709 F.2d 1200 (6th Cir. 1983).

Courts have declined to engage in a *Daubert* analysis at the class certification stage of the action on the ground that an inquiry into the admissibility of the proposed expert testimony

under Daubert would be an inappropriate consideration of the merits of the plaintiff's claims. *See O'Connor v. Boeing North American, Inc.*, 184 F.R.D. 311, 321 n. 7 (C.D.Cal. 1998); *In re Polypropylene Carpet Antitrust Litigation*, 996 F. Supp. 18, 26 (N.D.Ga. 1997)(postponing *Daubert* analysis, noting that at class certification stage, the court simply examines whether expert's methodology will comport with basic principles, will have any probative value, and will primarily use evidence that is common to all members of the proposed class).

In *In re Visa Check/Mastermoney Antitrust Litigation*, 192 F.R.D. 68, 76-77 (E.D.N.Y. 2000), the court observed that "there is a role for a *Daubert* inquiry at the class certification stage" and expressed doubt that a court could certify a class "on the basis of an expert opinion so flawed that it is inadmissible as a matter of law." However, the court concluded in that case that the proffered expert testimony was admissible "for the narrow purpose for which it is offered: to support the plaintiff's class certification motion." *Id.* at 78. This court is unable to say at this stage of the proceedings that the expert evidence offered by the plaintiffs is so flawed as to be inadmissible as a matter of law.

The weighing of statistical evidence is not appropriate at the class certification stage. *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 293 (2d Cir. 1999); *Hopewell v. University of Pittsburgh*, 79 F.R.D. 689, 693 (W.D.Pa. 1978)(noting it is improper at class certification stage to comment on the sufficiency of plaintiffs' statistical evidence in relation to proof of a prima facie case). However, this does not mean "that the conclusions plaintiffs urge on the basis of this evidence must be accepted uncritically. For common questions to exist, plaintiffs' statistical evidence must logically support the inference of discrimination against the

class asserted." *Hopewell*, 79 F.R.D. at 693. The appropriate inquiry is whether the statistics "are sufficient to show ... the existence of common questions." *Id.*

This court concludes that a *Daubert* inquiry is not warranted at this stage of the proceedings, and the defendant's motion to exclude this evidence is denied insofar as this evidence has been offered in support of the class certification motion. However, the court will carefully scrutinize this expert testimony to determine whether it in fact supports the certification of a class in this case. This ruling does not preclude the defendant from making a later motion under Daubert to exclude the admission of this evidence at trial.

II. Plaintiffs' Motion for Class Certification - Nature of Claims

The court will now address the motion for class certification. The plaintiffs seek to certify a class of all current and former African-American employees who have been employed by Honda since 1977. The broad class proposed by the plaintiffs would include nonexempt employees, such as production associates, team leaders, production staff employees, and other miscellaneous nonexempt employees, as well as exempt or managerial employees. Marc Bacon and Terry Harden, the named plaintiffs in the original complaint, are production associates.

The evidence reveals that Honda has four manufacturing plants in the central Ohio area: the Marysville Auto Plant (MAP), which manufactures Accord and Acura automobiles and has eight production departments; the Marysville Motorcycle Plant (MMP), which manufactures Honda motorcycles, motorcycle engines, and four-wheel utility vehicles and has five production departments; the Anna

Engine Plant (AEP), which manufactures drive and crank shafts, engines, and brake and suspension components and has eleven production departments; and the East Liberty Plant (ELP), which manufactures Honda Civics and has seven production departments. Other departments at Honda include the quality departments, which are technical production departments responsible for inspecting products coming off the line, the purchasing departments, and various business administration departments such as the Associate Relations Department which handles personnel matters. These other departments encompass both business administration staff exempt positions and office support staff nonexempt positions. In all, there are thirty-nine departments at Honda.

Sixty percent of Honda's 12,700 employees are production associates involved in production work. The production associates are supervised by team leaders, who are nonexempt employees. The team leader positions, being the first supervisory level over production associates, are filled from the ranks of production associates. Production associates in many departments may also seek a promotion to the nonexempt production staff position, although at least one department, MAP Assembly, filled its production staff positions from the ranks of team leader within that department. The duties of the production staff include special projects and equipment-related tasks. The next level of management above team leader and production staff is the exempt position of production coordinator. The production coordinator reports to an assistant manager or department manager, who in turn reports to a senior manager or plant manager.

Production associates are only permitted to apply for promotion to team leader or production staff positions in the department in which they are currently working, and some

minimum time worked in that department is typically an additional requirement for promotion. The employee must also have some minimum period of employment at Honda, a minimum attendance record, typically ninety-eight percent or above, and a disciplinary record devoid of managerial level counseling[3] for the previous year. The associate's performance rating on annual evaluations for a certain period, such as the past two years, may be a factor in determining ranking. Some departments may require the production associate to pass a trade test, to have completed a New Honda Circle ("NH Circle")[4] or to have accumulated a certain number of VIP points awarded for the completion of special projects such as an NH Circle. The associate applying for a team leader position must often be willing to work any shift or to travel.

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[3] Honda employs a disciplinary system with graduated levels. The first level of counseling is by the production coordinator, and may consist of the lesser level of coaching instead of counseling. The second level of counseling is administered by Honda's Associate Relations Department, which maintains personnel at each of the manufacturing facilities. The third level of counseling is the managerial level. The system gives supervisors some discretion in determining which level of counseling is appropriate for any particular violation. The most common variety of counseling occurs as a result of attendance issues. The progressive system of discipline for attendance problems features a seven-step process of coaching and counseling by coordinators, the Associate Relations Department and managers, culminating in placement on an Attendance Improvement Program.

[4] An NH Circle is a group of associates who meet on an overtime basis to work on a project for improving some aspect of the production process or to solve a particular production problem.

To be considered for a promotion to team leader or production staff, the production associate must have indicated an interest in promotion to those positions on his annual evaluation form. The various departments also utilize some type of interview procedure which may involve the associate being asked to complete some type of questionnaire. Each department has its own ranking, scoring and selection criteria, and is free to ask questions which are uniquely tailored to the particular needs and functions of that department. These criteria have changed over time. For example, beginning in April of 1998, Honda instituted a new promotion system which required associates to submit a promotion pool interest form, to take a training course, and to pass an assessment on the training materials to be considered for promotion, but this system was abandoned in March of 2000, and the training is now administered after promotion to the position. The promotion decisions are made by the coordinators or managers in the particular department. The scoring for interviews and the procedures used in the promotion process are reviewed by administration, but only to ensure that the department has correctly followed its promotion procedures.

The vacant team leader or production staff positions are posted in the department in which they occur. Since team leaders within the department are permitted to apply for a transfer to a vacant position on another shift, based on their seniority, it is not always possible to guarantee that the vacant position will remain as originally posted, and therefore, the exact nature of the vacant position is not always described.

During one period, production associates could seek a promotion to exempt positions in other nonproduction departments by completing a career interest application (CIA) and submitting this form to administration, where it was kept on file for one year. Various departments such as the

purchasing department were free to consider CIA applications or to fill the vacant position with an applicant from outside the company. The CIA system was replaced by a new posting system in March, 2000. Production associates can also apply for positions in the quality or skilled departments. The quality departments require applicants to complete an application and to pass a technical test, the Bennett Mechanical Comprehension Test, and the Tabe reading and math tests. Candidates are then placed in a quality pool maintained for promotions, and the decision to promote is made by the quality department. CIA promotions to exempt positions often entail unique procedures based on the position in question.

Production associates may request to be transferred to a different production department if they have at least two years tenure at Honda, at least one year in their current department, at least a ninety-eight percent attendance record, and no discipline above a certain level for the previous year. Transfers are awarded based on the availability of openings and the associate's "clock number"– the number he uses to clock into work – which is assigned based upon the associate's hire date and reflects the associate's seniority.

The claims advanced by the plaintiffs include race discrimination and the creation of a hostile work environment through the denial of favorable positions, skilled positions, transfers and promotions, through the operation of a "buddy system," and through the use of both objective and subjective employment criteria. The plaintiffs propose the certification of class claims which would proceed under both the disparate impact and pattern or practice disparate treatment theories of liability. Class pattern or practice disparate treatment claims, like individual disparate treatment claims, require proof of discriminatory intent, whereas disparate impact claims do not.

E.E.O.C. v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1273 (11th Cir. 2000).

A. Disparate Impact

A disparate impact claim under Title VII is established where a particular employment practice has caused a significant adverse effect on a protected group. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 657, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989). The disparate impact theory prohibits neutral employment practices which, while nondiscriminatory on their face, visit an adverse, disproportionate impact on a protected class even though there is no proof of discriminatory intent. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988); *Joe's Stone Crab*, 220 F.3d at 1274. The disparate impact method of proof may apply to claims alleging discrimination based on an employer's subjective decisionmaking, although the use of subjective criteria in decisionmaking is not discriminatory *per se*. *Watson*, 487 U.S. at 989.

The plaintiff in a disparate impact case must demonstrate that the employer uses a particular employment practice that causes a disparate impact on the basis of race. 42 U.S.C. § 2000e-2(k)(1)(A)(I). This is accomplished by demonstrating disparities through statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. *Watson*, 487 U.S. at 987, 994; *Joe's Stone Crab*, 220 F.3d at 1274-75.

Once the plaintiff establishes the adverse effect, the burden shifts to the employer to produce evidence that the challenged practice is a business necessity. *United States v. City of*

Warren, Mich., 138 F.3d 1083, 1091 (6th Cir. 1998).[5] If the employer is successful at establishing a business necessity defense, the plaintiff may still prevail by proving that other means or devices which do not entail an undesirable racial effect would be equally effective in serving the employer's legitimate interests, and that the employer's practices were a pretext for discrimination. *Ward's Cove*, 490 U.S. at 660-61; 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

The plaintiff must demonstrate that each particular challenged employment practice causes a disparate impact, "except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(I). In offering statistical evidence, the plaintiff must eliminate the most common nondiscriminatory reasons for the disparity. *Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036, 1045 (7th Cir. 1991). The plaintiffs need not take into account all measurable variables, but must include the major factors potentially responsible for any disparity. *Id.* "Normally, failure to include variables will affect the analysis' probativeness, not its admissibility." *Bazemore v. Friday*, 478 U.S. 385, 400, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986).

The plaintiff in a disparate impact case may seek only equitable relief such as injunctive and declaratory relief,

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[5] In the absence of a business necessity defense, the employer may also prevail by demonstrating that the specific employment practice under attack does not cause the disparate impact. 42 U.S.C. § 2000e-2(k)(1)(B)(ii).

reinstatement to a position and back pay, and a jury trial is not mandated. 42 U.S.C. § 1981a(a)(1)(compensatory and punitive damages not available in disparate impact case); 42 U.S.C. § 2000e-5(g)(providing for equitable relief under Title VII).

The plaintiffs in this case allege that various objective requirements for promotion employed by Honda result in an adverse impact on minorities. The plaintiffs allege that neutral criteria or practices such as the seniority requirement, the time-in-department requirement, the attendance requirement, the requirement of indication of interest in promotion, the limitation of team leader or production staff promotions to positions within the associate's department, the failure to post jobs, to permit applications for a specific job, or to identify the precise nature of the vacancy, and the use of trade tests all have a disparate impact on minority promotions. The plaintiffs also seek to employ the disparate impact method of proof to challenge the use of certain criteria which have subjective components, such as the use of annual performance reviews, disciplinary records, VIP or NH Circle points, and interviews and other devices requiring some subjective evaluation by a supervisor.

B. Class Disparate Treatment - Pattern or Practice Claim

A disparate treatment claim under Title VII, § 1981 and § 4112.99 is established where the plaintiff shows that the employer intentionally treated him or her less favorably than similarly-situated nonminority employees because of his race. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711,

103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983).[6] To prove a prima facie case of disparate treatment, a plaintiff must show that he (1) belongs to a racial minority, (2) suffered an adverse action, (3) was qualified for the position, and (4) he was treated differently from similarly situated or qualified nonminorities. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Once the prima facie case is established, the employer must produce evidence that the plaintiff was not promoted for a legitimate, nondiscriminatory reason. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The plaintiff may rebut the employer's nondiscriminatory reason with evidence of pretext, but the burden of proof remains with the plaintiff at all times. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

To establish a disparate treatment class action claim under the "pattern or practice" theory of disparate treatment, the plaintiffs must prove more than the mere occurrence of isolated, accidental or sporadic discriminatory acts; rather, the plaintiffs must show that racial discrimination was the employer's "standard operating procedure--the regular rather than the unusual practice." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336-38, 97 S. Ct.

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[6] The evidentiary framework applicable to disparate treatment claims under Title VII are also applicable to claims under § 1981. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992). Ohio courts have likewise held that the law in Title VII cases is generally applicable to discrimination claims under § 4112.99. *See Little Forest Medical Center v. Ohio Civil Rights Comm'n*, 61 Ohio St.3d 607, 575 N.E.2d 1164 (1991); *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Comm'n*, 66 Ohio St.2d 192, 421 N.E.2d 128 (1981).

1843, 52 L. Ed. 2d 396 (1977). *See also Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874-76 n. 9, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984). Such an action focuses on whether there exists a pattern of discriminatory decisionmaking. *Cooper*, 467 U.S. at 874-76.

The plaintiffs may establish a prima facie case of pattern or practice disparate treatment by the use of statistics which show a gross disparity in the treatment of workers based on race. *Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277, 1285 (5th Cir. 1994). The plaintiffs may bolster their case by introducing historical, individual, or circumstantial evidence. *Id.* The employer may then rebut the plaintiffs' prima facie case by showing that the plaintiffs' statistics are inaccurate or insignificant, or by providing a nondiscriminatory explanation for the apparent discrimination. *Id.*

Plaintiffs alleging individual or pattern or practice disparate treatment claims may recover compensatory and punitive damages. 42 U.S.C. § 1981a(a)(1). Compensatory damages include relief for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3). Compensatory damages do not include backpay, interest on backpay, or other equitable relief awardable under Title VII. 42 U.S.C. § 1981a(b)(2). Punitive damages may be recovered if the employer discriminated "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). Under the provision relevant to the instant case, compensatory and punitive damages awarded to each complaining party are limited to $300,000 under 42 U.S.C. § 1981a(b)(3)(D) on the Title VII claims, but this limit does not apply to the plaintiffs' claims under § 1981, see 42 U.S.C.

§ 1981a(b)(4), or under state law. In all cases in which the plaintiff seeks compensatory and punitive damages, either party is entitled to demand a trial by jury. 42 U.S.C. § 1981a(c).

The plaintiffs in this case allege that Honda has intentionally engaged in disparate treatment based on race through a pattern or practice of race discrimination. The plaintiffs allege that Honda intentionally engaged in race discrimination and the creation of a hostile work environment through the denial of favorable positions, skilled positions, transfers and promotions. The plaintiffs also allege that a "buddy system" existed at Honda, whereby friends assured that friends received promotions.[7]

The plaintiffs claim that African-Americans were subjected to disparate treatment through the selective manipulation of otherwise neutral employment criteria. For example, the plaintiffs contend that nonminorities were given preferential treatment in regard to attendance. Honda maintains a computerized system of attendance whereby absences or instances of tardiness result in an "occurrence" on the employee's record if not excused either by an authorized absence, such as sick leave, or, at the election of the employee, by the use of accrued vacation time or occurrence coverage. The plaintiffs contend that nonminority associates

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[7] The court questions whether this claim may serve as a basis for class certification. The Sixth Circuit has held that charges of nepotism or favoritism toward friends and relatives, even if proven, do not constitute evidence of impermissible discrimination under Title VII or § 1981 sufficient to support a disparate treatment claim. *See Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079, 1096 (6th Cir. 1996)(citing *Holder v. City of Raleigh*, 867 F.2d 823, 825-26 (4th Cir. 1989)).

were granted more favorable treatment in having their "occurrences" eliminated from the computerized system or through the coordinator failing to report the violation to the Associate Relations Department within three days for action. The plaintiffs also allege that the time-in-department requirement can be deliberately sabotaged in the case of minority applicants for promotion by the use of involuntary transfer to another department.

The plaintiffs also allege disparate treatment in the promotional criteria which involve a subjective component or the exercise of supervisor discretion. The plaintiffs contend that promotional opportunities for minorities at Honda are intentionally undermined on the basis of race through the use of lower performance evaluations, lower interview scores by supervisors during the promotion process, and the unequal imposition of discipline.

III. Class Certification - Rule 23(a) Requirements

Certification is governed by Fed.R.Civ.P. 23, which includes the following prerequisites for class certification:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

District courts must conduct a "rigorous analysis" into whether the prerequisites of Rule 23 are met before certifying a class. *General Tel. Co. v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982). In determining whether a class should be certified, the court must not delve into the merits of the action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974). However, the court may "probe behind the pleadings before coming to rest on the certification question[,]" *Falcon*, 457 U.S. at 160, and consider evidence presented by the parties on the maintainability of the class action. *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200 (6th Cir. 1974). The party seeking the class certification bears the burden of proof. *Falcon*, 457 U.S. at 161; *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996).

The parties do not dispute that the first requirement under Rule 23(a)(1), that of numerosity, has been satisfied by the class proposed by the plaintiffs, which is estimated to consist of over eight hundred employees and former employees. The remaining requirements under Rule 23(a) are commonality, typicality, and adequacy of representation. These requirements tend to merge. *Falcon*, 457 U.S. at 157 n. 13. For example, where there is no specific evidence identifying the questions of law or fact that are common to the claims of the plaintiffs and of the members of the class they seek to represent, then it is error to presume that the plaintiffs' claims are typical of other claims against the employer by class members. *Id.* at 158-59. The adequate representation requirement also overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentive to pursue the claims of the other class members. *American Medical Systems*, 75 F.3d at 1083.

A. Commonality

Rule 23(a)(2) requires that for certification there must be "questions of law or fact common to the class." Class certification is "particularly appropriate" when the issues involved are common to the class as a whole and when they turn on questions of law applicable in the same manner to each member of the class. *Falcon*, 457 U.S. at 154-156. Commonality does not require that the plaintiffs' claims be identical. There need be only a single issue common to all members of the class, and the mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not preclude the existence of commonality. *American Medical Systems*, 75 F.3d at 1080; *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988).

"It is not every common question that will suffice, however;" rather, it must be "a common issue the resolution of which will advance the litigation." *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998). Conclusory allegations of commonality or across-the-board discrimination will not satisfy the burden of proof on certification. *Falcon*, 457 U.S. at 157 (there is a wide gap between an individual plaintiff's claim of race discrimination, coupled with an unsupported allegation of a company policy of discrimination, and the existence of a class of persons who have suffered the same injury as the individual plaintiff); *American Medical Systems*, 75 F.3d at 1081 (conclusory allegations on commonality not sufficient). Rather, the class representative must specifically enumerate the questions of law or fact common to the class. *Falcon*, 457 U.S. at 158.

In the context of a class action alleging employment discrimination, factors which may be considered in

determining whether commonality is present include the following: (1) what is the nature of the unlawful employment practice charged and does it peculiarly affect a few employees or does it have classwide impact; (2) how uniform or diverse are the employment practices, considering the size of the work force, the number of plants, the diversity of employment conditions, occupations and work activities, the degree of geographic dispersion and of intra-company transfers, and the degree of centralization of administration and supervision versus local autonomy; (3) how uniform or diverse is the membership of the class, and will the alleged discriminatory treatment involve common questions; (4) the nature of the defendant's management organization as it relates to the degree of centralization and uniformity of employment and personnel policies and practices; and (5) the length of time spanned by the plaintiffs' claims and whether similar conditions prevailed throughout the period. *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24, 41 (N.D.Cal. 1977).

The plaintiffs here seek to certify a class consisting of every African-American who has ever been employed at the Ohio Honda facilities. Commonality and typicality are established for such an across-the-board class where the employer operated under a general policy of discrimination which manifested itself to all class members "in the same general fashion, such as through entirely subjective decisionmaking processes." *Falcon*, 457 U.S. at 159 n. 15. The plaintiffs allege that Honda has a subjective decisionmaking process which impacts the award of promotions. However, in applying Falcon's footnote 15, "courts have required plaintiffs to show that a defendant's decisionmaking process is entirely subjective before permitting an across the board attack." *Appleton v. Deloitte & Touche L.L.P.*, 168 F.R.D. 221, 228 (M.D.Tenn. 1996). *See*

also Vuyanich v. Republic National Bank of Dallas, 723 F.2d 1195, 1200 (5th Cir. 1984); *Wynn v. Dixieland Food Stores, Inc.*, 125 F.R.D. 696, 701 (M.D.Ala. 1989)(footnote 15 applies only where defendants used one entirely subjective selection system which employed same selection process regardless of the type or level of job filled).

Evidence has been presented to the court that the defendant does not employ entirely subjective criteria in selecting candidates for promotion. Although some factors considered in the promotion process, including interviews or questionnaires, disciplinary record and annual evaluations, may involve some subjective elements, an associate's eligibility for promotions is also based on certain objective criteria such as time at Honda, time in the department, attendance records, or test scores from objective trade tests. Even some of the subjective components are not entirely without structure. For example, the interviews are done using a pre-established set of questions for each applicant, and although the disciplinary system necessarily vests some discretion in the coordinators and managers, the managers frequently consult with each other and with the Associate Relations Department to compare cases in an effort to ensure that unduly severe or disproportionate discipline is not imposed. The court concludes that the nature of the plaintiffs claims does not excuse them from their obligation under Falcon to establish commonality among the proposed class members. See *Appleton*, 168 F.R.D. at 229.

If commonality is to be found at all in this case, it would be found in the plaintiffs' disparate impact claims. Commonality and typicality may be more difficult to establish in cases alleging disparate treatment, *Nelson v. U.S. Steel Corp.*, 709 F.2d 675, 679 n. 9 (11th Cir. 1983), particularly in a case, as here, involving multiple facilities with significant

local autonomy, *Stastney v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 274 n. 10 (4th Cir. 1980).

As noted previously, the disparate impact claims in this case involve neutral criteria or practices such as the seniority requirement, the time-in-department requirement, the attendance requirement, the requirement of indication of interest in promotion, the limitation of team leader or production staff promotions to positions within the associate's department, the failure to post jobs, to permit applications for a specific job, or to identify the precise nature of the vacancy, the use of trade tests, and the consideration of factors which may involve subjective components, such as annual performance reviews, disciplinary records, VIP or NH Circle points, and interviews.

The above criteria, with the exception of trade tests and subjective components which vary from department to department and from supervisor to supervisor, appear to impact at least the production associate members of the proposed class in a like or similar way. Although there may be minor variations in these criteria,[8] and although the weight afforded those criteria in the promotion process might vary depending on the department, such differences are not critical to a finding of commonality on the disparate impact claim.[9]

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[8] For example, some departments require a ninety-eight percent attendance record while others require one hundred percent attendance. The time in department requirement also vary depending upon the nature of the production process in those departments.

[9] The plaintiffs have presented statistical evidence which they claim would support a finding of disparate impact in regard to some of these promotion criteria. While there may well be gaps in this

However, the plaintiffs' disparate treatment claims and the disparate impact claims which involve subjective components raise different concerns about commonality. The plaintiffs allege that Honda considered subjective factors in making promotions and used subjective practices in imposing discipline and evaluating employee performance which had a discriminatory impact on African-American employees. They further allege that the defendant intentionally engaged in race discrimination through the denial of favorable positions, skilled positions, transfers and promotions, through the existence of a "buddy system," through less favorable treatment of attendance problems, and through the use of subjective decisionmaking in performance evaluations, interviews, and the imposition of discipline. However, the plaintiffs have not shown that any of these practices extends to the proposed class as a whole.

The class sought to be certified includes over eight hundred African-Americans, and it encompasses employees in four manufacturing plants and thirty-nine departments. As indicated by the testimony of Dr. Frank Landy, an industrial organizational psychologist retained by the defendant to study its manufacturing operations, these departments perform diverse functions, including the casting of parts, the manufacture of engines and other automobile and motorcycle parts and components, the assembly of automobiles, welding and painting, requiring diverse levels of skill. The period of

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evidence which the plaintiffs' experts have failed to address, it would not be appropriate for the court at this point to determine the weight or credibility to be assigned the testimony of these experts, or to resolve whether the plaintiffs have established the merits of their claims. The evidence presented is sufficient to make at least a marginal showing that these disparate impact claims would be common to the class.

time covered by the plaintiffs' claims exceeds twenty years, during which time promotion practices have changed periodically. The promotion decisions, annual performance reviews, and disciplinary decisions are made by each department, by different coordinators and managers, as opposed to some centrally located decisionmaker. In light of the number of departments involved, the autonomy of those departments, the number of decisionmakers involved, and the diverse job functions and qualifications of those departments, the plaintiffs have not established that proof of any one class member's claim of disparate treatment will involve "a common issue the resolution of which will advance the litigation." *Sprague*, 133 F.3d at 397.

This court notes that commonality is not established where the decisions allegedly constituting discrimination were made by different supervisors and decisionmakers. *See, e.g., Bradford v. Sears, Roebuck & Co.*, 673 F.2d 792, 794 n. 4 (5th Cir. 1982)(no commonality where evidence failed to show a uniform policy throughout various facilities); *Zachery v. Texaco Exploration and Production, Inc.*, 185 F.R.D. 230, 238-39 (W.D.Tex. 1999)(fact that class members hold a wide variety of jobs in widely dispersed locations under different management with local autonomy, subject to numerous different evaluation and promotion systems, precluded finding of commonality for certification of disparate impact claim); *Reyes v. Walt Disney World Co.*, 176 F.R.D. 654, 658 (M.D.Fla. 1998)(no commonality where plaintiffs employed by three separate departments with different decisionmakers); *Zapata v. IBP, Inc.*, 167 F.R.D. 147, 159 (D.Kan. 1996)(no commonality where plaintiffs have failed to present evidence of centralized employment decisionmaking, and where claims were based on alleged discriminatory conduct of individual supervisors); *Lumpkin v. E.I. Du Pont de Nemours & Co.*, 161 F.R.D. 480 (M.D.Ga. 1995)(no commonality or

typicality in disparate treatment case where plaintiffs employed in different departments and supervised by different people).

The fact that the Employee Relations Department maintained a check function to ensure that each department properly followed the department's own procedures in awarding a promotion is not sufficient to show centralized decisionmaking, where the Employee Relations Department had no authority to make the promotion decision. *See Rosenburg v. University of Cincinnati*, 118 F.R.D. 591, 593 (S.D.Ohio 1987)(commonality requirement not met where each department had its own promotion criteria and only centralized review was to ensure that each department adequately considered components in developing its own criteria and following them).

The court finds that, while the plaintiffs have arguably established commonality in regard to some of their disparate impact claims, as specified above, they have not shown that commonality exists in regard to their claims of disparate treatment. These disparate treatment claims are not subject to generalized proof, but instead are highly individualized depending on the circumstances of each employee, including that employee's qualifications and eligibility at the time of the vacancy, the criteria used by the particular department for promotion to the position sought, the timing and availability of vacancies in the department, and the persons in the department making the promotion decisions.

B. Typicality

The next requirement for class certification is that the claims of the representatives are typical of those of the class. Fed.R.Civ.P. 23(a)(3). The typicality requirement limits the

class claims to those fairly encompassed by the named plaintiffs' claims. *General Tel. Co. v. E.E.O.C.*, 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980). "A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members." *American Medical Systems*, 75 F.3d at 1082.

To be typical, a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law. *Senter v. General Motors Corp.*, 532 F.2d 511, 525 n. 31 (6th Cir. 1976). A claim is typical if it arises from the same event or course of conduct giving rise to the claims of other class members and is based on the same legal theory. *Id.* at 525. However, typicality is not present where a "named plaintiff who proved his own claim would not necessarily have proved anybody else's claim." *Sprague*, 133 F.3d at 399.

Named plaintiff Marc Bacon commenced his employment at Honda in 1988 as a production associate in MAP welding. When a notice of an opening in the welding department was announced on November 3, 1989, he did not have eighteen months service at Honda, as required for that position. He transferred to MAP Assembly on May 5, 1991, and was thus ineligible for promotion to team leader until May of 1992. Beginning in 1992, MAP Assembly promoted only team leaders to production staff positions. In August, there was a job posting which required applicants to have completed an NH Circle within the previous twenty-four months, and he did not meet this requirement.

Over the years, Bacon indicated an interest in promotion to various positions, including team leader, production staff,

office support staff, and purchasing. However, from 1994 through 1996, he did not indicate an interest to promotion to team leader and only those who did were considered for promotion. He indicated in 1996 that he was not interested in taking the department test. He transferred to MMP Assembly on February 3, 1997, and was thereafter ineligible for promotion until February 3, 1998. In April of 1998, Honda instituted a new promotion system which required associates to submit a pool interest form, to take a training course, and to pass an assessment on the training materials to be considered for promotion. Bacon never completed a pool interest form. In October, 2000, he completed a CIA. He was interviewed on three occasions for positions in the purchasing department. On one of those occasions, he did not meet the ninety-eight percent attendance requirement. On the other two occasions, other African-Americans were chosen for the position.

Terry Harden was first employed as a production associate at Honda in September of 1988, starting in the MAP Paint Department. In May of 1991, he transferred to MAP Assembly, where he remains today. He was ineligible for promotion for twelve months after his transfer. Beginning in 1992, MAP Assembly promoted only team leaders to the position of production staff, and there were no promotions to team leader from May of 1992 until December 31, 1992. In 1994 and 1995, he indicated an interest in being promoted to an office staff position and exempt staff, and was therefore not considered for a team leader position during those years. In 1996, he indicated an interest in the team leader position but did not pass the department test. Harden took no steps to seek promotion to team leader between April, 1998, and March, 2000.

The above histories indicate that the efforts of Bacon and Harden to seek promotions may have been affected by the disparate impact of such facially neutral, objective selection devices as the seniority requirement, the time-in-department requirement, the attendance requirement, the requirement of indication of interest in promotion, and the limitation of team leader or production staff promotions to positions within the associate's department which the court has held meet the commonality requirement. In that respect, the disparate impact claims of these plaintiffs are typical of the disparate treatment claims of the proposed class.

However, the named plaintiffs have not demonstrated that their disparate treatment claims or their disparate impact claims based on subjective factors are typical of those of the class. For example, Bacon testified at the class certification hearing that he disagreed with his evaluation ratings in certain years, but made no connection between those evaluations and his failure to gain a promotion. He was ineligible for promotion during one period due to his attendance record, but has proffered no evidence that the person awarded the position he sought was given more lenient treatment for attendance violations. While Harden was ineligible for promotion to team leader due to his failure to pass a department test, there is no evidence that there are other African-American class members who were similarly disadvantaged by this test. According to the defendant, Bacon and Harden, made no complaints regarding job assignments or transfers in their depositions. There is no evidence that their discipline record was ever a factor in the failure of Bacon and Harden to win a promotion. Bacon was interviewed on three occasions for positions in the purchasing department, but there is no evidence that any subjective judgments made during these interviews constituted disparate treatment which was typical of that experienced by

other class members, particularly since on two occasions, African-Americans were awarded those positions.

Further, during some of the period in question, Bacon and Harden did not apply for the team leader position or other positions. A proposed class representative's claims for failure to promote are not typical of those of other class members claiming discrimination in promotion if the class representative never applied for a similar promotion. *See Warren v. ITT World Communications, Inc.*, 95 F.R.D. 425, 429 (S.D.N.Y. 1982). The court does not construe typicality as requiring that the named plaintiffs have applied for every single promotion in order to be typical class members. However, in light of the diverse promotion practices in place at Honda, where every department had its own promotion criteria, typicality has not been shown where the named representative never sought a promotion in his own department or other positions in nonproduction departments for which he may have been eligible.

The comments made in the discussion on commonality concerning the diversity of Honda's operations and the use of decentralized decisionmaking apply as well to the issue of typicality. Considering the large number of factors which are considered in the promotion process, the diversity in the promotion processes used by the various departments, the different qualifications of the various positions as dictated by the varying needs of the departments, and the large number of coordinators or managers who are making the various decisions which impact the promotion process, it has not been shown that the named plaintiffs have suffered the same injuries as the members of the proposed class.

Thus, the court concludes that, while typicality is arguably satisfied in regard to some of the plaintiffs' disparate impact

claims, as outlined above, the plaintiffs have failed to show typicality in regard to their disparate impact claims based on trade tests or subjective decisionmaking or their disparate treatment claims.

C. Adequacy of Representation

The final requirement under Rule 23(a) is that the class representative will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a)(4). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. A class representative must be a part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625, 117 S. Ct. 2231 138 L. Ed. 2d 689 (1997).

There are two criteria for determining whether the representation of the class will be adequate: (1) The representative must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel. *Senter*, 532 F.2d at 524-25. *See also Rutherford v. City of Cleveland*, 137 F.3d 905, 909 (6th Cir. 1998)(to satisfy the adequate representation requirements of Rule 23, there must be an absence of a conflict of interest and the presence of common interests and injury).

To the extent that the two named plaintiffs in the original complaint filed in this case are seeking to represent exempt employees or employees who are not production associates, they do not qualify as adequate representatives. Several courts have held that a conflict of interest may arise where nonsupervisory employees attempt to represent supervisory

employees, or where exempt employees seek to represent nonexempt employees. *See, e.g., Gilchrist v. Bolger*, 733 F.2d 1551, 1554 (11th Cir. 1984); *Appleton*, 168 F.R.D. at 233; *Wakefield v. Monsanto Co.*, 120 F.R.D. 112, 116 (E.D.Mo. 1988); *Grant v. Morgan Guaranty Trust Co. of New York*, 548 F. Supp. 1189, 1193 (S.D.N.Y. 1982)(conflict of interest for class to represent both managers who process promotions and employees who apply for them).

At Honda, exempt level employees and even team leaders participate in employment decisions touching upon production associates in matters of promotion, associate evaluations and discipline which would place them in the conflicting position of having to defend their actions against a discrimination challenge. The named plaintiffs have also not demonstrated that associates employed outside the production area in areas such as office support staff share common concerns with production associates.

It has also not been demonstrated that the named plaintiffs in this case would share common interests with former employees. Courts have declined to certify classes consisting of both former and present employees on the basis that commonality and typicality are lacking. *See, e.g., Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1570 (11th Cir. 1992); *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1035 (9th Cir. 1990). Former employees may have no desire to return to work at Honda, and would have no interest in the injunctive relief relating to promotion policies sought by the named plaintiffs. Any claim that former employees have may be complicated by the length of their employment at Honda and the circumstances surrounding their termination of employment.

On the issue of the qualifications of counsel, the court in *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1465 (9th Cir. 1995) noted that the responsibility of class counsel to absent class members whose control of the attorneys is limited does not permit even the appearance of divided loyalties, and the "appearance" of divided loyalties includes both differing and potentially conflicting interests, not merely instances actually manifesting such conflict.

The defendant argues that plaintiffs' counsel cannot adequately represent the class of African-Americans proposed in this case in light of the fact that three of the law firms representing the plaintiffs in this case (Laufman, Rauh & Gerhardstein; Waite, Schneider, Bayless & Chesley; and O'Hara, Ruberg, Taylor, Sloan & Sergent) also represent a proposed class of female Honda employees in the case of *Hoffman v. Honda of America Mfg., Inc.*, Case No. C-2-97-248, now pending in the United States District Court for the Southern District of Ohio, Western Division. In that case, the plaintiffs are alleging that Honda has discriminated against them in awarding work assignments, skilled positions, transfers, and promotions due to their gender. *See Hoffman v. Honda of America Mfg., Inc.*, 191 F.R.D. 530, 531 (S.D.Ohio 1999).

The relief sought by the *Hoffman* plaintiffs includes injunctive relief, reinstatement, back pay and front pay, and compensatory and punitive damages. Thus, the claims of the Hoffman plaintiffs mirror in many respects the class claims in this case, and the equitable relief sought, which might include promotion or assignment to certain positions of limited number or availability or other types of affirmative action, could foreseeably place these two classes in competition with each other.

The plaintiffs do not respond specifically to this argument, arguing instead that it is permissible to include more than one protected group in a single class. However, the focus of the defendant's argument is on the potential conflict which could arise as a result of counsel's representation of both of these groups. This question was discussed in *Beavers v. American Cast Iron Pipe Co.*, 852 F.2d 527, 531 (11th Cir. 1988), where the court addressed the issue of whether counsel could adequately represent both a class of female employees and male employees suing the same employer. In that case, both classes challenged the employer's policy of providing health insurance to a child of an employee only when the child resided with the employee full time. The court permitted counsel to continue to represent both classes, reasoning that the relief sought by the classes was not conflicting because if one class succeeded in eliminating the policy, that result would also benefit the other class.

In the instant case, while some of the relief sought by the *Hoffman* class may also inure to the benefit of the proposed class in this case, the fact that class members from these two proposed classes may be seeking the same job assignments or promotions, which are limited in number, would be sufficient to create concern on the part of the male members of the African-American class that counsel may not be pursuing their interests as rigorously in the conduct of the action or in settlement negotiations as they are the interests of the female *Hoffman* plaintiffs. One possible remedy for this situation would be the retention of new class counsel by either the *Hoffman* plaintiffs or the plaintiffs in this case. However, it is unknown whether the named plaintiffs in either case would be willing to retain new counsel at this stage, when the proceedings and discovery in both cases are well advanced. Such a course of action would likely result in the further delay of this case and a postponement of the current trial date.

Under the present stature of the case, the court concludes that adequacy of representation requirement has not been satisfied.

IV. Class Certification - Rule 23(b) Requirements

In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3).

A. Certification Under Rule 23(b)(1)

Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing "incompatible standards of conduct for the party opposing the class," Fed.R.Civ.P. 23(b)(1)(A), or would "as a practical matter be dispositive the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests," Fed.R.Civ. P. 23(b)(1)(B).

The plaintiffs argue that certification would be appropriate under Rule 23(b)(1)(A) on the basis that actions by individual plaintiffs might expose the defendant to the risk of incompatible standards of conduct. However, the mere fact that some plaintiffs might win and others might lose in individual actions is not sufficient. *In re Bendectin Products Liability Litig.*, 749 F.2d 300, 305 (6th Cir. 1984). Likewise, the possibility that individual actions would have a precedential effect is not enough. *In re Dennis Greenman Securities Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987); *Leer v. Washington Educ. Assoc.*, 172 F.R.D. 439, 451 n. 7 (W.D.Wash. 1997)(not sufficient that separate actions would raise the same question of law; separate actions must result in defendant having to choose between incompatible standards of conduct in fulfilling judgments in separate actions); *National*

Union Fire Ins. Co. of Pittsburgh, Pa. v. Midland Bancor, Inc., 158 F.R.D. 681, 687 (D.Kan. 1994)(class under Rule 23(b)(1)(A) requires more than possibility of inconsistent judgments or resolutions of identical questions of law.)

There has been no showing that Honda would be placed in the position of having to employ incompatible standards of conduct if individual discrimination actions were filed in this case. Any monetary damages or injunctive relief awarded in cases filed by individual employees would extend only to those employees. Further, certifying a pattern or practice or disparate impact class under Rule 23(b)(1)(A) would not necessarily shield Honda from future actions brought by individual employees. Even if Honda prevailed on a class action disparate impact or pattern or treatment claim, individual employees would still be able to file actions alleging disparate treatment in their own cases. *Cooper*, 467 U.S. at 880.

There is likewise no evidence before the court that certification would be appropriate under Rule 23(b)(1)(B). There is no evidence that any action filed by an individual employee would "as a practical matter be dispositive the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests[.]" This is not a "limited fund" case, where numerous persons make claims against a fund insufficient to satisfy all claims. The court finds that it is not appropriate to certify a class under Rule 23(b)(1).

B. Certification Under Rule 23(b)(2)

The plaintiffs also contend that a class may be certified in this case under Fed.R.Civ.P. 23(b)(2), which permits certification where "the party opposing the class has acted or refused to act on grounds generally applicable to the class,

thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Actions for class-wide injunctive or declaratory relief "involve uniform group remedies" which may often be awarded "without requiring a specific or time-consuming inquiry into the varying circumstances and merits of each class member's individual case." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 414 (5th Cir. 1998).

Certification of a 23(b)(2) class turns on whether the injunctive and/or declaratory relief sought on behalf of the class predominates relative to any incidental monetary damages requested. *Butler v. Sterling, Inc.*, 210 F.3d 371 (unreported), 2000 WL 353502*6 (6th Cir. 2000)(citing *Allison*, 151 F.3d at 410). *See also Lemon v. International Union of Operating Engineers, Local No. 139, AFL-CIO*, 216 F.3d 577, 580-81 (7th Cir. 2000)(nonequitable monetary relief may be obtained in a Rule 23(b)(2) class action only if the predominant relief sought is injunctive or declaratory).

In *Allison*, the Fifth Circuit noted that monetary relief "predominates" under Rule 23(b)(2) "when its presence in the litigation suggests that the procedural safeguards of notice and opt-out are necessary, that is, when the monetary relief being sought is less of a group remedy and instead depends more on the varying circumstances and merits of each potential class member's case." *Allison*, 151 F.3d at 413.[10] The court found

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[10] The Sixth Circuit noted in *Butler*, 210 F.3d 371, 2000 WL 353502*6, that the Supreme Court has expressed serious reservations about the propriety of certifying a 23(b)(2) class when compensatory or punitive damages are in issue due to the lack of notice to class members or the opportunity for those members to "opt out" of the class action, citing *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 120-21, 114 S. Ct. 1359, 128 L. Ed. 2d 33 (1994).

that monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief, that is, damages which flow directly from liability to the class as a whole, to which class members are automatically entitled once liability to the class as a whole is established. *Id.* at 415. The court went on to explain:

> The recovery of incidental damages should typically be concomitant with, not merely consequential to, class-wide injunctive or declaratory relief. Moreover, such damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individuals's case; it should neither introduce new and substantial legal or factual issues, not entail complex individualized determinations. Thus, incidental damages, will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions.

The Seventh Circuit in Lemon further discussed the characteristics of a Rule 23(b)(2) class action, as follows:

> By virtue of its requirement that the plaintiffs seek to redress a common injury properly addressed by a class-wide injunctive or declaratory remedy, Rule 23(b)(2) operates under the presumption that the interests of the class members are cohesive and homogeneous such that the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members. A suit for money

> damages, even if the plaintiffs seek uniform, class-wide equitable relief as well, jeopardizes that presumption of cohesion and homogeneity because individual claims for compensatory or punitive damages typically require judicial inquiry into the particularized merits of each individual plaintiff's claim.

216 F.3d at 580.

The court in *Allison* was careful to distinguish prior cases which recognized that a class can be certified under Rule 23(b)(2) even where the plaintiffs demand backpay as an equitable remedy. *Allison*, 151 F.3d at 415. However, it is often possible to award backpay by reference to objective standards governing eligibility, even though some inquiry into individual circumstances is necessary. The court in *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 928-29 (9th Cir. 1982) further remarked on the distinction between compensatory damages and backpay:

> Unlike back pay, compensatory damages are not subsumed by the traditional equitable concepts of reinstatement and restitution. More importantly, establishing the amount of compensatory damages due each plaintiff is a far more complex and uncertain exercise than the determination of back pay, and greatly complicates the management of the class action.

The Fifth Circuit in *Allison* concluded that compensatory damages, which compensate the plaintiffs for emotional and other intangible injuries, are an individual, not a class-wide, remedy. *Allison*, 151 F3d at 417. To be eligible for compensatory damages, a plaintiff must prove that the

employer's unlawful actions caused emotional distress, by means of expert or nonexpert testimony; factors unique to the plaintiff, such as the plaintiff's mental or physical symptoms resulting from the employer's conduct, the plaintiff's unusual vulnerability, or the plaintiff's particular economic and emotional sensitivity, may be considered. *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1215 (6th Cir. 1996). This proof necessarily involves an inquiry into the individual circumstances of each plaintiff.

Punitive damages must be reasonably related to the reprehensibility of the defendant's conduct and to the compensatory damages awarded to the plaintiffs. *Allison*, 151 F.3d at 417. Thus, punitive damages must be determined after proof of liability to individual plaintiffs, not upon the mere finding of general liability to the class at the first stage, and upon proof of how the discrimination was inflicted on each plaintiff, introducing new and substantial legal and factual issues not capable of computation by reference to objective standards. *Id.* at 418.

In *Hoffman v. Honda of America Mfg., Inc.*, 191 F.R.D. 530 (S.D.Ohio 1999), the court rejected the argument made by the defendant that the certification of a class under Rule 23(b)(2) is always precluded as a matter of law where the plaintiffs seek compensatory and punitive damages. Rather, the court concluded that "relief relates predominantly to money damages when that is the form of relief in which the plaintiffs are primarily interested" and that the court "must make an assessment of the relative importance of the remedies sought, given all of the facts and circumstances of the case." *Id.* at 535-36.

This court agrees that there is no language in *Allison* which suggests that the court there intended to adopt a per se

rule to the effect that injunctive relief can never predominate under Rule 23(b)(2) where compensatory and punitive damages are sought. A case may arise, for example, where the compensatory and punitive damages sought are so *de minimus* that they are merely incidental to the primary injunctive and declaratory relief sought in the case. On the other hand, Rule 23(b)(2) certainly cannot be read as requiring the court to accept the plaintiffs' ranking in importance of the various forms of relief they seek in the action. *Hoffman* offers no specific standards a court may employ in making an assessment of the relative importance of the remedies sought, but essentially leaves that matter up to the discretion of the court.

While the Fifth Circuit's definition of "predominates" and "incidental" may be more restrictive in terms of what is required for certification under Rule 23(b)(2), those definitions are rationally related to the type of class action which is envisioned under that subsection and provide some guidance for resolving these questions. As the court commented in *Miller v. Hygrade Food Products Corp.*, 202 F.R.D. 142, n. 6 (E.D.Pa. 2001), while other decisions, including *Hoffman*, have disagreed with the test in *Allison*, no other court had "created a superior test."

The plaintiffs in the present case seek compensatory and punitive damages and attorney's fees in addition to injunctive and declaratory relief, including back pay. There is no evidence or allegation that each class member was affected in the same manner by the multitude of allegedly discriminatory practices and policies at issue in this case or that they suffered the same damages. Whether each class member is entitled to recover compensatory and punitive damages is a question which will mandate an inquiry into the circumstances of that class member. If the criteria announced in *Allison* are

employed, a class cannot be certified under Rule 23(b)(2) in this case because the compensatory and punitive damages sought by the plaintiffs would not flow automatically from a determination of liability on the part of the defendant to the class as a whole on the disparate impact and pattern or practice claims, and are thus not merely incidental.

However, even employing a broader view of the concept of primacy, the court notes that the compensatory and punitive damages which may be recovered by each individual class member under Title VII in this case are substantial, up to $300,000, and no dollar limit is applicable to their claims under § 1981 and state law. The fact that the plaintiffs have sought what may be significant compensatory and punitive damages in addition to back pay indicates that monetary relief is not merely incidental to their equitable claims. The plaintiffs also seek to include former employees in the class. The fact that injunctive relief would not provide a remedy to these former employees, and that their only remedy would be money damages, is a further indication that the plaintiffs' claims are primarily for money damages. See *Zapata*, 167 F.R.D. at 162. This court cannot conclude that the claims for monetary relief are merely "incidental," or that the injunctive and declaratory relief sought by the plaintiffs is primary and predominates over the monetary relief sought by the plaintiffs. The court finds that certification under Rule 23(b)(2) would not be appropriate in this case.

C. Certification Under Rule 23(b)(3)

The plaintiffs also contend that a class should be certified under Fed.R.Civ.P. 23(b)(3). This subsection permits certification where a class suit "may nevertheless be convenient and desirable." *Amchem Products*, 521 U.S. at 615 (quoting Adv. Comm. Notes). To qualify for certification

under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites: common questions must predominate over any questions affecting only individual members; and class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy. *Id.* The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation, and is "far more demanding" than Rule 23(a)'s commonality requirement. *Id.* at 623-24. Where a finding of liability requires separate proof for each plaintiff, liability is not a predominate issue. *Mertens v. Abbott Laboratories*, 99 F.R.D. 38, 41 (D.N.H. 1983). The prevalence of individual questions weighs against a finding of superiority. *American Medical Systems*, 75 F.3d at 1085.

Although certification under this provision is possible where individual damages are high, the procedural device of a Rule 23(b)(3) class action was designed primarily to allow the vindication of rights in cases where the monetary amount at stake would not provide adequate incentive for any individual to bring a solo action. *Amchem Products*, 521 U.S at 617. The Rule 23(b)(3) class action device was also intended to achieve the economies of time, effort and expense. *Sterling*, 855 F.2d at 1196.

Plaintiffs "do not necessarily satisfy the requirement that questions of law or fact predominate merely by alleging a pattern or practice claim. *Ramirez v. DeCoster*, 194 F.R.D. 348, 353 (D.Me. 2000). Rule 23(b)(3) treatment is inappropriate where litigation would ultimately "degenerate in practice into multiple lawsuits separately tried." Fed.R.Civ.P. 23(b)(3), Advisory Notes to 1966 Amendments.

Here, the plaintiffs have asserted claims for compensatory and punitive damages. In *Allison*, the court found that such

claims would require focusing almost entirely on facts and issues specific to individuals rather than the class as a whole, and that such a class action would degenerate into multiple lawsuits separately tried, so that common issues did not predominate. *Allison*, 151 F.3d at 419. The court further noted that the predominance of individual-specific damage issues detracted from the superiority of the class action device, particularly since a jury was required to hear the case, which involved over a thousand potential class members spread across two separate facilities, represented by six different unions, working in seven different departments, alleging discrimination over a twenty-year period. Id. The court went on to comment that due to the potentially substantial value of the compensatory and punitive damages claims, up to $300,000 under Title VII, "the 'most compelling rationale for finding superiority in a class action--the existence of a negative value suit,' is missing in this case." *Id.* at 420 (quoting *Castano v. American Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996)).

The court also rejected the plaintiffs' suggestion that the first stage of their pattern or practice claim could be certified as a class action under (b)(2) or (b)(3) for trial with the disparate impact claim, while reserving the decision whether to certify the compensatory and punitive damages claims. The court noted that the second stage of a pattern or practice claim is essentially a series of individual lawsuits, stating "we see no legal basis for the district court to certify a class action on the first stage of the plaintiffs' pattern or practice claim when there is no foreseeable likelihood that the claims for compensatory and punitive damages could be certified in the class action sought by the plaintiffs." *Allison*, 151 F.3d at 421. The court also held that bifurcating selected individual issues for class treatment at a later stage of the case to ensure that the common class issues in the case are predominant in

the first stage of the case would eviscerate the predominance requirement of Rule 23(b)(3). *Id.* at 422.

Other courts have declined to certify Rule 23(b)(3) class actions where individual issues concerning each class member's entitlement to monetary damages would predominate. *See, e.g., Ramirez*, 194 F.R.D. at 353 (finding unmanageable class of one thousand members who worked for different durations, in different positions, in different barns or plants, with different supervisors, over course of six to seven years, despite allegations of pattern of discrimination and subjective decision-making.)

The instant case involves circumstances similar to those in *Allison*. The plaintiffs seek to certify a class of over eight hundred potential class members, including every African-American who has ever been employed at Honda over a period of time exceeding twenty years. These class members are spread over four separate manufacturing facilities and thirty-nine departments, each with promotion practices and job requirements which varied from department to department and from position to position and over time, and they challenge a multitude of promotion practices and criteria. A calculation of compensatory and punitive damages will require a highly individualized inquiry into the circumstances of each class member to determine if or how he or she was injured by the alleged discriminatory practices and to what extent.

Consideration of the factors set forth in Rule 23(b)(3) also indicates that class certification under (b)(3) is not appropriate. In light of the substantial amount of compensatory and punitive damages potentially recoverable in this case and the diverse circumstances of the absent class members, they have a substantial interest in individually controlling the prosecution of separate actions. *See Georgine*

v. Amchem Products, Inc., 83 F.3d 610, 633 (3d Cir. 1996)(plaintiffs have a substantial interest in controlling prosecution of separate actions where large awards are possible). The court is unaware of any other pending litigation concerning the same controversy already commenced by other members of the class. There is no evidence that this court would be the forum of choice of the absent class members, or that it is particularly desirable to concentrate the litigation of the claims in this forum. A similar action against Honda involving a potential class of female employees is pending in the Western Division of the Southern District of Ohio. *See Hoffman, supra*. Further, as noted above, the difficulties likely to be encountered in the management of a class action, considering the diverse circumstances of the class members and the individual inquiries needed to prove compensatory and punitive damages, are considerable.

This case is factually distinguishable from other cases where the Rule 23(b) criteria were found to be satisfied. For example, in *Smith v. Texaco, Inc.*, 88 F. Supp.2d 669, 676, 681 (E.D.Tex. 2000), the court certified a class of only two hundred salaried African-American employees whose pay grades, promotions and evaluations were all determined by the same subjective decision-making processes which remained substantially the same over time, where all employment decisions were made at the defendant's headquarters, and where the plaintiffs were "a much more homogenous group who have suffered similar damages" than those in *Allison*.

D. Seventh Amendment Concerns

The plaintiffs here have proposed bifurcating the class action into two stages, whereby the issues of liability and the claim for punitive damages would be tried in the first

proceeding, and the class claims for compensatory relief would be addressed in the second proceeding.

In *Allison*, the Fifth Circuit addressed the question of whether the certification of a class action might be impacted by the parties' right to a jury trial under the Seventh Amendment. The court, relying on its prior decision in Castano, 84 F.3d at 750, held that the Seventh Amendment permits bifurcation of issues to separate juries only when those issues are so distinct and separable that the second jury will not be called upon to consider findings of fact by the first.

The court in *Allison* addressed the feasibility of certifying the disparate impact claim under Rule 23(b)(2) in light of the fact that the plaintiffs were also pursuing a class pattern or practice claim with demands for punitive and compensatory damages which they sought to certify under Rule 23(b)(3). The court noted that, although the right to a jury trial under Title VII extended only to the plaintiffs' pattern or practice claim, "once the right to a jury trial attaches to a claim, ... it extends to all factual issues necessary to resolving that claim." *Allison*, 151 F.3d at 423 (citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)). The court went on to state that even though the jury demand did not reach the disparate impact claim or any equitable relief,

> resolution of the disparate impact claim and of equitable remedies must nevertheless take into account the Seventh Amendment. When claims involving both legal and equitable rights are properly joined in a single case, the Seventh Amendment requires that all factual issues common to these claims be submitted to a jury for decision on the legal claims before the final

> court determination of the equitable claims. In this case, both parties have a Seventh Amendment right to have a jury determine all factual issues necessary to establish the plaintiffs' pattern or practice claim, a claim for legal damages that they have properly joined in the same action with a disparate impact claim for equitable relief. As a result, each factual issue common to these claims, if any, must be decided by the jury before the district court considers the merits of the disparate impact claim and whether the plaintiffs are entitled to any equitable relief.

(Citations and footnote omitted). *Allison*, 151 F.3d at 423-24. The court noted that the same employment policies and practices were challenged under both claims, and that the business necessity defense to the disparate impact claim mirrored the legitimate nondiscriminatory reason defense to the disparate treatment claims. *Id.* at 424. The court concluded that in light of the existence of factual issues common to both the disparate impact and pattern or practice claims, a trial of the disparate impact claim in a class action severed from the remaining nonequitable claims was precluded under the Seventh Amendment. *Id.* at 425.

Several other courts before and after *Allison* have declined to certify bifurcated classes in light of the problems presented by the Seventh Amendment. *See, e.g., Miller*, 202 F.R.D. 142*6 (bifurcation of employment discrimination claims would violate Seventh Amendment); *Burrell v. Crown Central Petroleum, Inc.*, 197 F.R.D. 284, 292 (E.D.Tex. 2000)(trying issues of classwide liability and punitive damages in first trial and litigating compensatory damages in subsequent trials would violate Seventh Amendment); *Ramirez*, 194 F.R.D. at 351 (agreeing with *Allison* and holding that where defenses offered by employer to claims for compensatory and punitive

damages in remedial stage of pattern or practice case would require jury to re-weigh evidence bearing on liability, certification of class was precluded); *Faulk v. Home Oil Co., Inc.*, 184 F.R.D. 645, 649 (M.D.Ala. 1999)(claims for compensatory and punitive damages precluded certification under Rule 23(b), following *Allison*); *McKnight v. Circuit City Stores, Inc.*, 168 F.R.D. 550, 552-53 (E.D.Va. 1996)(claims alleging discrimination in promotions and transfers not certified where proposed stages would require multiple juries to reexamine the same issues), vacated on other grounds *sub nom. Lowery v. Circuit City Stores, Inc.*, 527 U.S. 1031, 119 S. Ct. 2388, 144 L. Ed. 2d 790 (1999).

This court agrees with the reasoning of those courts and concludes that the plaintiffs' proposal for trying the class disparate impact and disparate treatment claims of liability and punitive damages first, then trying the class claims for compensatory damages in a subsequent trial would violate the Seventh Amendment. Since punitive damages must be reasonably related to the reprehensibility of the defendant's conduct and to the compensatory damages awarded to the plaintiffs, it would not be feasible to permit one jury to pass on the issue of punitive damages while allowing a subsequent jury or juries to decide each class member's entitlement to compensatory damages without violating the Seventh Amendment. *Allison*, 151 F.3d at 417-18. Even if the issue of punitive damages is deferred to a later stage, the second jury would be required to re-weigh evidence and issues relating to liability determined by the first jury in determining who is entitled to punitive and compensatory damages.

Allison indicates that the Seventh Amendment problem would not be solved by certifying a class under Rule 23(b)(2) solely on the disparate impact claim. To do so in this case would present a problem under the Seventh Amendment since

many of the neutral promotion criteria forming the basis of the plaintiffs' disparate impact claim, such as the time-in-department requirement and the attendance requirement, are also alleged to have been intentionally manipulated by agents of the defendant as tools of disparate treatment. Thus, much of the evidence relied on to establish class liability in the disparate impact phase would have to be re-examined by a later jury determining the class pattern or practice disparate treatment claims and the individual class members' entitlement to compensatory and punitive damages. Further, since the same employment policies and practices are being challenged under both the disparate impact and pattern or practice theories, the business necessity defense to the disparate impact claim and the legitimate nondiscriminatory reason defense to the disparate treatment claims will involve common issues and "are not 'so distinct and separable' from one another that they may be considered separately by multiple factfinders without violating the Seventh Amendment." *Id.* at 424 (quoting *Gasoline Prod. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500, 51 S. Ct. 513, 75 L. Ed. 1188 (1931)).

E. Fairness and Efficiency

Even if this case did not present a problem under the Seventh Amendment, this court would still conclude that Rule 23(b) class certification is not the most fair and efficient way to litigate the plaintiffs' claims. See *McKnight*, 168 F.R.D. at 553.[11] The litigation of class claims for compensatory and punitive damages in a class action would not result in the

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[11] The decision of the district court to decertify the class on this basis was affirmed by the Fourth Circuit in *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 757-759 (4th Cir. 1998), vacated on other grounds, 527 U.S. 1031 (1999).

accelerated and efficient disposition of the case. Multiple juries would be needed to try the compensatory and punitive damages claims of class members regardless of whether the action proceeds as a class action or as individual actions.

Even if the case were bifurcated, the issues involved in this case of over eight hundred potential class members would be unmanageable. Despite plaintiff's blanket claims asserting that Honda used a promotion scheme resulting in disparate impact and had a standard operating procedure of discrimination through subjective decision-making, this case would involve primarily individual-specific inquiries. *See Ramirez*, 194 F.R.D. at 353. The class proposed by the plaintiffs, namely, all former and current African-American employees who have worked at Honda since 1977, would involve workers at both the production and managerial levels in thirty-nine different departments, working different jobs in four different plants, with different supervisors using different promotion practices which varied over the years. Even if the proposed class is confined to production associates, this action "will erode into a series of individual trials focusing on issues specific to each worker." *Id.* It would also not promote the interests of judicial economy to bifurcate the disparate impact claim and try it first. Due to the overlap between the disparate impact claim and the class pattern or practice claim, which involve many of the same practices, the same evidence and expert testimony would be relevant to both claims and would have to be presented twice.

Plaintiffs suggests bifurcating the proceedings by trying the liability and punitive damages issues in the first phase and the compensatory damages issues in the second phase. This procedure would require the defendant to litigate the issue of punitive damages before the issue of compensatory damages has been decided. Unfairness to the defendant would result

because the jury deciding the issue of punitive damages would not hear evidence concerning the entitlement of each class member to compensatory damages, which is relevant to the plaintiffs' entitlement to punitive damages. *Allison*, 151 F.3d at 417-418; *McKnight*, 168 F.R.D. at 553 (determination of punitive damages in first phase of case unfair to defendant).

Under the bifurcation scheme proposed by the plaintiffs, the defendant would be obligated to put on the same evidence bearing on the defenses of business necessity and legitimate nondiscriminatory reasons both at the liability phase of the trial and at the compensatory damages phase of the trial. This would not only be unfair to the defendant, but also would not serve the interests of judicial economy.

V. Conclusion

After carefully considering the record and the requirements of Rule 23, the court concludes that the certification of the proposed class is not appropriate, and the plaintiffs' motion for certification of a class with named plaintiffs Bacon and Harden as class representatives is denied.

It is so ordered.

/s/ James L. Graham
United States District Judge

Date: March 7, 2001

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed Apr 30, 2001]

Case No. C-1-99094
MAGISTRATE JUDGE HOGAN

Marc E. Bacon, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
Honda of America Mfg., Inc.,	)
Defendant.	)
	)

OPINION AND ORDER

This is an employment discrimination action filed pursuant to 42 U.S.C. §1981, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), and Ohio Revised Code § 4112.02, *et seq.* The plaintiffs, African-American employees of defendant Honda of America Manufacturing, Inc. ("Honda"), allege that they have been discriminated against on the basis of their race in employment matters such as promotions, transfers, and job assignments. Plaintiffs, relying on both the disparate treatment and disparate impact theories of liability, assert that the defendant has engaged in

a pattern and practice of discrimination against African-Americans through the operation of a "buddy system" and through the use of both objective and subjective promotion criteria.

This matter is before the court on the defendant's motions for summary judgment on the claims of plaintiffs Marc E. Bacon and Terry L. Harden. Bacon and Harden are employed as production associates at Honda. On March 7, 2001, this court issued an order declining to certify a class of production associates. Therefore, these summary judgment motions address only the claims asserted by plaintiffs Bacon and Harden individually.[1]

The procedure for granting summary judgment is found in Fed. R. Civ. P. 56(c), which provides:

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[1] The plaintiffs have repeatedly stated, most recently at the final pretrial conference held on March 13, 2001, that they have not had the opportunity to conduct discovery on their individual claims. The court reiterates the statements in its order of March 2, 2001 and observes that none of the court's scheduling orders suggest that the parties would not be required to conduct merits discovery in time to file dispositive motions and proceed to trial on the dates indicated in those scheduling orders. The court further notes that much of the voluminous record submitted at the class certification hearing relates to the individual claims of Bacon and Harden, and the defendant relies heavily on class certification hearing exhibits in its summary judgment motions. The plaintiffs were permitted to depose Rick Gardner, the only witness specifically identified by the plaintiffs as being able to provide evidence they were lacking, and that deposition has been reviewed by the court.

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). However, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that partywill bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that Liberty Lobby, *Celotex* and *Matsushita* effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. *Street v. J. C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989). The court in *Street* identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. *Id.* at 1479. In addition, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Id.* (quoting

Liberty Lobby, 477 U.S. at 257). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party to merely "'show that there is some metaphysical doubt as to the material facts.'" *Id.* (quoting *Matsushita*, 475 U.S. at 586). Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

I. Pattern and Practice Disparate Treatment Claims

The plaintiffs have alleged that the defendant engaged in acts constituting a pattern or practice of discrimination. The defendant argues that since the court has declined to certify a class of production associates, Bacon and Harden may not proceed under this theory as individual plaintiffs.

A "pattern or practice" claim is not a separate cause of action, but merely another method by which disparate treatment can be shown. *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1219 (5th Cir. 1995). A pattern and practice claim may be brought by the government pursuant to 42 U.S.C. § 2000e-6(a), or by a class of private plaintiffs. *E.E.O.C.v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1286 (11th Cir. 2000). In such cases, the plaintiffs must establish that discrimination was the company's standard operating procedure, rather than an unusual practice, and must prove more than the mere occurrence of isolated or accidental or sporadic discriminatory acts. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

A pattern or practice claim may be proved by statistical evidence combined with anecdotal evidence or by direct evidence of discriminatory intent to treat the protected class unequally. *Joe's Stone Crab*, 220 F.3d at 1287. Once a pattern or practice of discrimination has been established, a rebuttable presumption of discrimination is established, and the burden of proof shifts to the employer to demonstrate that the showing of a pattern or practice of discrimination is either inaccurate or insignificant. *Id.*, n. 22. If the employer fails to rebut the plaintiffs' prima facie case, then an inference arises that all employees subject to the policy were its victims and are entitled to appropriate remedies. *Teamsters*, 431 U.S. at 362. To obtain relief for individual employees, the plaintiffs must demonstrate that the employees were actual victims of the policy, but the burden remains on the employer to prove that the individual employees were denied an employment opportunity for lawful reasons. *Id.*

In contrast, individual plaintiffs alleging discrimination are typically required to prove discrimination either through direct evidence of discrimination or by satisfying the shifting burden of proof scheme established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To establish a prima facie case of discrimination, the individual plaintiff must show that: (1) he is a member of a protected class; (2) he was qualified for the job; (3) he suffered an adverse employment decision; and (4) he was treated differently than similarly situated non-minorities. *Thurman v. Yellow Freight Systems, Inc.*, 90 F.3d 1160, 1168 (6th Cir. 1996). When the plaintiff has established a prima facie case of discrimination, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employment decision. *McDonnell Douglas*, 411 U.S. at 804. If the defendant satisfies this burden, the presumption raised by the plaintiff's prima facie case is rebutted. *Thurman*, 90 F.3d at 1166. The

ultimate burden of proof remains with the plaintiff to prove that the employer's reasons were a pretext for discrimination and that the employer intended to discriminate on the basis of race. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

In *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 761 (4th Cir. 1998), the court held that the *Teamsters* pattern or practice method of proof is not available to individual plaintiffs. The court in *Lowery* noted that the Supreme Court had never extended the *Teamsters* method of proof to a private, nonclass discrimination suit, and has stated that "there is a 'manifest' and 'crucial' difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination." *Id.* at 761 (quoting *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984)). The court in *Lowery* further commented on the fact that class action pattern or practice suits differ from individual disparate treatment suits in the nature of their remedies, in that pattern or practice suits primarily seek to redress widespread discrimination and harm suffered by the members of the class, whereas private, nonclass disparate treatment cases focus on harm to the individual. *Id.*

Other circuits have engaged in reasoning similar to that of the *Lowery* court in addressing the limits of a pattern and practice claim. *See e.g.*, *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 711 (2d Cir. 1998) (noting that *Teamsters* hinged on initial finding of a history of discrimination by employer to a class of plaintiffs); *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1252 (7th Cir. 1990) (in case involving individual claim, not a class action, pattern and practice evidence only collaterally relevant to individual claim); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 866 n. 6 (7th Cir. 1985) (finding pattern and practice argument misplaced in nonclass suit);

Scarlett v. Seaboard Coast Line R. Co., 676 F.2d 1043, 1053 (5th Cir. 1982) (individual plaintiff must prove *McDonnell Douglas* elements rather than proceeding under a pattern or practice theory under *Teamsters*); *Williams v. Boorstin*, 663 F.2d 109, 115 n. 38 (D.C.Cir. 1980) (noting that since case was not a class action, "evidence of systematic or general instances of discrimination can only be collateral to evidence of specific discrimination against the actual plaintiff.").

Various district courts have been persuaded by the reasoning in *Lowery* and have declined to allow individual plaintiffs in nonclass actions to employ the pattern or practice method of proof to establish individual violations of Title VII or § 1981. *See Ramirez v. DeCoster*, 194 F.R.D. 348, 361-62 and n.23 (D.Me. 2000) (plaintiffs may not rely solely on pattern or practice proof, but rather must establish individual violations of §1981 under *McDonnell Douglas* framework); *Cooper v. Diversicare Mgt. Services Co.*, 115 F.Supp.2d 1311, 1322 (M.D.Ala. 1999) (individual plaintiff may not bring a "pattern or practice" cause of action); *Herendeen v. Michigan State Police*, 39 F.Supp.2d 899, 905-06 (W.D.Mich. 1999) (plaintiffs may not rely on *Teamsters* framework as sole basis for proving their individual discrimination claims); *Victory v. Hewlett-Packard Co.*, 34 F.Supp.2d 809, 821 (E.D.N.Y. 1999) (pattern or practice claim not appropriate outside of class action); *Demuren v. Old Dominion University*, 33 F.Supp.2d 469, 479-80 (E.D.Va. 1999) (nonclass action plaintiffs may not assert a pattern and practice claim).

This court agrees with the reasoning of the above authorities and concludes that it would not be appropriate to employ the *Teamsters* pattern or practice method of proof to the nonclass claims of plaintiffs Bacon and Harden. That is not to say that pattern or practice evidence is per se

inadmissible in a nonclass action. Evidence offered to prove the existence of a pattern or practice of discrimination may also be relevant and useful in establishing a prima facie case of individual disparate treatment under *McDonnell Douglas*, in proving pretext, or in satisfying a plaintiff's ultimate burden of proving discrimination. *Lowery*, 158 F.3d at 761. *See also Cooper*, 467 U.S. at 880 (pattern or practice evidence is relevant on the issue of pretext); *Ramirez*, 194 F.R.D. at 361 (pattern or practice evidence may be used to bolster individual claims of disparate treatment); *Herendeen*, 39 F.Supp.2d at 906 (statistical and anecdotal evidence of pattern or practice of discrimination may be probative of intentional discrimination and is generally admissible in individual discrimination cases). However, the court will analyze the claims of the individual plaintiffs under the *McDonnell Douglas* framework.

II. Individual Disparate Treatment Claims

To establish a prima facie case of disparate treatment under *McDonnell Douglas*, a plaintiff bears the burden of establishing by a preponderance of the evidence the following elements: (I) membership in the protected class; (2) that he suffered from an adverse action; (3) that he was qualified for the position; and (4) that he was treated differently from similarly situated members of the unprotected class. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-83 (6th Cir. 1992).[2]

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[2] The evidentiary framework applicable to disparate treatment claims under Title VII are also applicable to employment discrimination claims under § 1981 and § 4112.02, *et seq.* *See Mitchell*, 964 F.2d at 582; *Little Forest Medical Center v. Ohio Civil Rights Comm'n*, 61 Ohio St.3d 607 (1991); *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Comm'n*, 66 Ohio St.2d 192 (1981).

When the plaintiff establishes a prima facie case, the defendant may offer any legitimate, nondiscriminatory reason for the action, which the plaintiff may then rebut with evidence of pretext, although the burden of proof at all times remains with the plaintiff. *Hartsel v. Keys*, 87 F.3d 795, 800 (6th Cir. 1996). A plaintiff can also establish a prima facie case by presenting direct evidence of discriminatory intent. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

In the context of a failure to promote claim, a plaintiff must demonstrate that: (1) he is a member of a protected class; (2) he applied for and was qualified for a promotion; (3) he was considered for and denied a promotion; and (4) other employees of similar qualifications who were not members of the protected class received promotions. *Nguyen v. City of Cleveland*, 229 F.3d 559, 562-63 (6th Cir. 2000); *Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d !079, 1095 (6th Cir. 1996).

A. Disparate Treatment in Production Department Transfers and Job Assignments

Plaintiffs Bacon and Harden have alleged in their complaint that they were subjected to disparate treatment in regard to transfers and job assignments. The plaintiffs have offered no evidence to support their claim of discrimination in transfers or job assignments in or between production departments. Rather, the plaintiffs' deposition testimony reveals that their real complaint is with the failure to award transfers or job assignments which are a component of promotions to higher positions. *See* Bacon Dep., p.98; Harden Dep., pp. 565-570.

Production associates may request to be transferred to a different production department if they have at least two years seniority at Honda, at least one year in their current

department, at least a ninety-eight percent attendance record, and no discipline above a certain level for the previous year. Transfers are awarded based on the availability of openings and the associate's "clock number" – the number he uses to clock into work – which is assigned based upon the associate's hire date and reflects his seniority relative to other employees.

The evidence reveals that Bacon requested a departmental transfer on two occasions, once from Honda's Marysville Auto Plant ("MAP") Weld Department to the MAP Assembly Department, and once from MAP Assembly to Honda's Marysville Motorcycle Plant ("MMP") Assembly Department. Both of those transfer requests were granted. Bacon indicated that he had no complaints about how departmental transfers were handled. Bacon Dep., p. 97. Harden requested a transfer on one occasion from the MAP Paint Department to MAP Assembly. Harden Dep., p. 121. This transfer request was granted. There is no evidence that Bacon and Harden were ever denied a transfer from one production department to another production department when they requested a transfer, or that they were ever transferred by Honda against their will. Plaintiffs likewise have pointed to no evidence that they were given or denied a particular job assignment within their department on the basis of their race. No genuine issue of fact has been shown to exist in regard to the plaintiffs' claims of discrimination in transfers between production departments and job assignments.

B. Disparate Treatment in Promotions

Plaintiffs Bacon and Harden also assert that they have been subject to disparate treatment in the award of promotions. The evidence reveals that Bacon was first employed at Honda's Marysville Auto Plant ("MAP"), which manufactures Accord and Acura automobiles and has eight

production departments. He began his employment in the MAP Weld Department, and then transferred to the MAP Assembly Department. He later transferred to Honda's Marysville Motorcycle Plant ("MMP"), which manufactures Honda motorcycles, motorcycle engines, and four-wheel utility vehicles and has five production departments. Harden has always worked at MAP, first in the MAP Paint Department, and then in MAP Assembly. Honda has two other manufacturing plants in Ohio, the Anna Engine Plant ("AEP"), which manufactures drive and crank shafts, engines, and brake and suspension components and has eleven production departments, and the East Liberty Plant ("ELP"), which manufactures Honda Civics and has seven production departments.

In addition to the thirty-one production departments, Honda also has nonproduction departments, including the quality departments,[3] the Purchasing Department, and business administration departments such as the Associate Relations Department which handles personnel matters.

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[3] The quality departments at Honda include such departments as the Product Engineering Department, which assures the quality of automotive drawings and specifications; the Parts Quality Department, which assures the quality of automobile parts procured by Honda's Purchasing Department; the Market Quality Department, a production control group which assures the quality of Honda manufactured automobiles; the Certification Department, which obtains certification approvals for Honda's automobiles from applicable governmental agencies and produces evidence of compliance to self-certifiable regulations; and the Quality Assurance Department, which assures conformance to Honda quality standards. Defendant's Motion for Summary Judgment on Harden Claims, Ex. C, Hodies Affid., ¶2.

Sixty percent of Honda's 12,700 employees are production associates involved in production work. Production associates are supervised at the first level by team leaders, and thus advancement to the nonexempt team leader position is one promotion route available to production associates.

Production associates in some departments may also seek promotion to the nonexempt position of production staff, whose duties include special projects and equipment-related tasks. However, Rick Gardner, formerly an assistant manager in MAP Assembly from February of 1992 through February, 2000, testified in his deposition that beginning in 1992, MAP Assembly, where Bacon was employed for several years and where Harden is still employed, filled its production staff positions from the pool of team leaders within the department rather than promoting production associates to those positions. Gardner Dep., p. 37.[4]

The next level of management above team leader and production staff is the exempt position of production coordinator. The production coordinator reports to an assistant manager or department manager, who in turn reports to a senior manager or plant manager.

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[4] The plaintiffs refer to an analysis done by Dr. James McClave, the plaintiffs' statistics expert, which indicates that fifteen MAP Assembly production associates were promoted to production staff. *See* Defendant's Memorandum Contra Class Certification, Ex. 212. However, the defendant has submitted additional uncontroverted evidence that these fifteen promotions identified by Dr. McClave were to quality or facilities departments outside of MAP Assembly. Kim Althouse Affid., 12-1-00, ¶¶3-6. The evidence presented by plaintiffs is insufficient to create a genuine issue of fact on this point.

Honda's promotion policies vary from department to department, and have changed over time. Pursuant to Honda's promotion policies, production associates are only permitted to apply for promotion to team leader or production staff positions in the department in which they are currently working. Another requirement for promotion to these positions is that the production associate must have worked at Honda for a certain minimum period of time (the seniority requirement) and in the department in which the position is available for a minimum period of time (the department seniority requirement). The production associate must also have a minimum attendance record, usually ninety-eight percent or above, and must have a disciplinary record which is devoid of manager-level counselings, or, in some cases, any counselings[5] for the previous year.

Some production departments, including MAP Assembly, have required production associates to pass a trade test. Another requirement may be that the associate must have completed a New Honda Circle ("NH Circle")[6] within a certain period of time or accumulated a certain number of Voluntary Improvement Program

("VIP") points, which are awarded for the completion of special projects such as an NH Circle or for offering helpful suggestions concerning quality or safety issues. The associate

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[5] Honda uses a graduated discipline system with levels ranging from coaching or counseling by a coordinator, counseling by the Associate Relations Department, and counseling by a manager.

[6] An NH Circle is a group of associates who meet on an overtime basis to work on a project for improving some aspect of the production process or to solve a particular production problem.

applying for a team leader position must often be willing to work any shift, work overtime, or travel.

To be considered for a promotion to team leader or production staff, production associates were required at one point to indicate an interest in promotion to one or both of those positions on their annual employee self-progress report. Beginning in April of 1998, production associates were required to submit an application to be included in the team leader/production staff promotion pool. Production associates in MAP Assembly were also required to pass an assessment on training materials to be considered for promotion, but this assessment system was abandoned in March of 2000, and the training is now administered after promotion to the position. The promotion process also features some type of interview. Each department has its own ranking, scoring and selection criteria based on the needs Of the particular department. The promotion decisions are made by the coordinators or managers in the particular department. For example, Rick Gardner testified that when he was in charge of the promotion process in MAP Assembly from late 1994 to 1997, he used an interview team made up of himself and three other supervisors. Gardner Dep., p. 91.

Production associates desiring promotion to a nonproduction department such as the Purchasing Department during the time period relevant to this case were required to file a career interest application ("CIA") with the plant's Administration Department, which remain on file for one year.[7] These departments were free to consider CIAs or to hire candidates from outside Honda.

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[7] The CIA system was replaced by a posting system in March, 2000.

Production associates seeking positions in the quality departments are required to Pass certain mechanical, reading and math tests and complete an application for entry into the quality pool. Qualified candidates who passed the tests and who met other basic requirements such as seniority at Honda, ninety-eight percent attendance, no manager level counselings during the previous twelve months, and willingness to travel, work overtime and work any shift, are then entered into the quality selection pool. Associates placed in the pool are asked to complete a technical application and submit to a Phase I interview, which involves answering questions about job preference, experience in defined areas and technical skills. All applications and interview notes are placed in an anonymous file which is assigned a file number, but which contains no information as to the applicant's name, associate number, race or gender. When a vacancy arises, the blind files are reviewed to search for candidates who meet the needs of the particular department, and candidates are selected for a Phase II interview.

1. Proof Of Application as Element of Prima Facie Case

The plaintiffs argue that they should not be required in this case to show that they applied for a promotion, citing *Dews v. A.B. Dick Co.*, 231 F.3d 1016 (6th Cir. 2000). In that case, the court held that a plaintiff complaining of a failure to promote does not have to establish that he applied for and was considered for the promotion when the employer does not notify its employees of the available promotion or does not provide a formal mechanism for expressing interest in the promotion. *Id.* at 1022.

As a general rule, a plaintiff must show that he applied for and was considered for the position as an element of his prima facie case. *Kreuzer v. Brown*, 128 F.3d 359, 364 (6th Cir.

1997). In order to overcome the lack of application for a position, a plaintiff must present "overwhelming evidence of pervasive discrimination in all aspects of [the employer's] practices," and must also show that "any application would have been futile and perhaps foolhardy." *Harless v. Duck*, 619 F.2d 611, 617-18 (6th Cir. 1980).

In this case, the evidence shows that Honda had a formal mechanism for expressing interest in promotion. For example, in order to be considered for promotion to the positions of team leader and production staff in MAP Assembly where the plaintiffs worked, an associate who otherwise met certain minimum qualifications, such as seniority, attendance or testing requirements, was asked to indicate an interest in promotion to those positions on his annual associate self-progress report. No specific application for a particular vacancy was required, and this indication of interest remained in effect for the year following the signing of the report.

By way of illustration, Bacon's 1993 self-progress report, Exhibit II to defendant's memorandum contra class certification, contains a section headed as "CAREER DEVELOPMENT" in which the associate indicates whether he wishes to be considered for promotion, and if so, to what positions. Boxes are available to check an interest in promotion to production staff, production team leader or either of the above. The form also includes a section where the associate can explain why he is not interested in promotion. In both the instruction section and the career interest sections of the form, the associate is told that if he does not indicate an interest in promotion on the form, he will not be considered for promotion. Both Bacon and Harden used these associate self-progress reports to indicate their promotion interests.

The language on the self-progress report also informs the associate that if he indicates no interest in promotion on the report but later changes his mind, he can show his interest in promotion at any time by completing a supplemental promotion interest form provided by the plant administration department. The form also advises the associate that if he is interested in being promoted into another department, he must complete a CIA form provided by the plant administration department.

In April of 1998, Honda implemented a new promotion procedure whereby team leaders and production staff positions were filled from a team leader/production staff pool. Production associates were required to complete a team leader/production staff pool interest form to be considered for promotion to those positions. The record includes announcements concerning this new system, including a schedule of meetings to be held to inform associates of the details of the new system. Defendant's Memorandum Contra Class Certification, Exs. 26-27. Exhibit 26 indicates that this information was also available to employees on CCTV, Honda's in-house broadcast system which could be viewed in the employee cafeterias. Bacon's associate self-progress report for 1998, Exhibit 30 to defendant's memorandum contra class certification, advised production associates to see an administration representative with questions about the next available opportunity to apply for the team leader/production staff promotion pool. Thus, the evidence indicates that the defendant took steps to ensure that its employees were informed about its promotion policies and how to apply for positions.

Honda also has formal procedures in place for promotion to the nonproduction departments. Production associates desiring promotion to one of the nonproduction departments,

such as the Purchasing Department and Accounting Department, are required to complete a CIA form which remains on file for a year. Both Bacon and Harden filed such applications, and were clearly familiar with the requirements for competing for nonproduction department positions. The quality departments require applicants to pass certain tests before being included in a pool from which candidates for promotion may be selected. Harden passed the tests and was included in the quality promotion pool.

The plaintiffs argue that they should be considered as having applied for a promotion to team leader or production staff even if they did not indicate an interest in promotion to those positions on their associate self-progress report or through a pool interest form. However, the court does not see how requiring an employee to at least indicate a general interest in promotion by checking a box or filling out a form before he can be considered as part of a promotion pool is unfair to the employee. In fact, one court has held that a general request for promotion in an annual review is insufficient to establish a prima facie case because "employers would be unfairly burdened in their promotion efforts" and would "have to keep track of all employees who have generally expressed an interest in promotion and consider each of them for any opening for which they are qualified but did not *specifically* apply" rather than simply considering individuals who have specifically applied for a promotion. *Brown*, 163 F.3d at 710.

Here, Honda has taken on the greater burden of considering qualified associates for promotion to vacant team leader and production staff positions where those associates simply indicate a general interest in promotion by checking a box on their associate self-progress report or by completing a separate form for that purpose. The plaintiffs have failed to

show why they should be excused from at least indicating a general interest in being considered for promotion to team leader or production staff.

There is evidence indicating that this is not a case where the employer failed to notify employees of promotion procedures or opportunities. According to the affidavit of Mary Ann Patterson, an employee of Honda's Administration Department, production associates were notified by their departments as to what steps were needed to apply for team leader or production staff positions and the requirements for these positions through announcements at required morning meetings and posting written information in the department. Defendant's Memorandum Contra Class Certification, Ex. B. The documentary evidence contains numerous job postings for job openings for the positions of team leader in MAP Assembly. *See, e.g.*, Defendant's Memorandum Contra Class Certification, Exhibits 4-8, 12, 16, 19, 23. The record also contains documents, designated as pre-shift announcements to be read and/or posted concerning the new team leader/production staff promotion pool which went into effect in April of 1998. *See* Defendant's Memorandum Contra Class Certification, Exhibits 26-29, 31-33.

Rick Gardner, an assistant manager in MAP Assembly from 1992 to 2000, testified that information concerning promotions was posted at the front entrance to the plants, at the time clocks where associates checked in, and on bulletin boards near the associate locker rooms. Gardner Dep., pp. 65-75. Coordinators were told to announce postings at the morning shift meetings. *Id.*, p. 65. According to Zane Mathys, who supervised the MAP Assembly promotion process from 1991 to 1994, openings for team leader were posted at time clocks throughout the department in five or six locations, and in 1994, notices were also posted on a bulletin

board near the Administration Department. Defendant's Memorandum Contra Class Certification, Ex. Z, Mathys Affid., ¶2. From 1991 to 1994, openings for team leader were also announced at the pre-shift meetings. *Id.*

Plaintiff Bacon acknowledged seeing postings, particularly in the area of the team leader's desk. Bacon Dep., pp. 239, 243, 259, 273. Mathys stated that he talked with Bacon on two occasions in approximately 1993 and explained the MAP Assembly promotion requirements for team leader. Mathys Affid., Ex. Z, ¶10. Bacon indicated that he did not come in the main entrance in the mornings and would generally not check the boards. Bacon Dep., pp. 270-272. He also stated that he eats lunch in his truck, and therefore does not view the programs available on CCTV in the employee cafeterias. *Id.*, p. 477. During his deposition, plaintiff Harden was shown copies of Honda's Navigator Magazine, *see, e.g.*, Exhibits 89, 90, Defendant's Memorandum Contra Class Certification, a short magazine sent to associates, which contained information relating to the new promotion process adopted in 1998 and the team leader assessments or tests, but did not recall reading those magazine notices. Harden Dep., pp. 385-85, 407-08. Harden testified that he had never seen the postings for vacancies, but he recalled seeing items posted by the time clock, and he did not dispute that vacancies were announced at the morning shift meetings, or that promotion information was available for inspection after those meetings. *Id.*, pp. 172, 178, 187.

While the plaintiffs did not always recall seeing written materials or hearing announcements concerning promotion opportunities or testing requirements, they offered no evidence in their depositions that those postings or announcements were not made, or that the information concerning the defendant's promotion processes was not

available. The fact, evidenced by their deposition testimony, that the plaintiffs did not always read or seek to review available information or inquire about promotion opportunities does no£ establish that the defendant had a policy of failing to advertise the positions or promotion requirements.

The plaintiffs have also failed to produce overwhelming evidence of pervasive discrimination in all aspects of the defendant's promotion practices or to show that any application would have been futile and perhaps foolhardy. In fact, the record contains evidence that African-Americans did occupy supervisory positions at Honda. Harden testified during his deposition that John Duffy, an African-American friend hired after Harden, was promoted to team leader, then to production staff and coordinator in MAP Assembly. Harden Dep., pp. 534-37. Evidence has also been presented concerning African-Americans who occupied or were awarded positions in the Purchasing Department where Bacon and Harden submitted applications, including Henry Turner and Nate Applebee. Bacon Dep., pp. 376, 696. An African-American woman was chosen for one of the positions for which Bacon interviewed in the Purchasing Department. Defendant's Motion for Summary Judgment on Bacon Claims, Ex. B., Bell Affid.

The fact that the plaintiffs consistently indicated an interest in promotion on their associate self-progress reports belies their claim that they felt an application would be futile. The evidence reveals that Bacon filed five CIAs indicating an interest in a promotion to the Purchasing Department, and he was interviewed on three occasions. Bacon Dep., pp. 306, 315-27, 330333, 337-38, 357-59. Harden filed a CIA to the Production Control Department and was entered in the quality departments selection pool. He was interviewed by quality departments on two occasions. Harden Dep., pp. 474, 485.

The plaintiffs have failed to show that circumstances are present in this case which would excuse them from the requirement of showing that they applied for the position as an element of their prima facie case. The plaintiffs' burden in this case is not a heavy one, because Honda's application requirements are lenient. The plaintiffs' argument that they should be excused even from making a general expression of interest in promotion is not supported by law or the circumstances of this case. The court finds that this case is not one where the application requirement should be excused.

2. *Disparate Treatment in Promotions - Bacon*

Plaintiff Bacon was hired as a production associate in MAP Weld, second shift, on October 3, 1988. There was a posting for production staff positions in the Weld Quality Group, with applications due by November 3, 1989. However, there is no evidence that Bacon met the minimum requirements for these positions. The evidence does show that he did not meet the requirement of eighteen months service at Honda until April of 1990. Therefore, Bacon has not shown that he could prove that he was qualified for these positions, an element of his prima facie case. He has not produced evidence that nonminority employees who had less than eighteen months seniority at Honda were promoted.

In 1990, Bacon marked his 1989 associate self-progress report to indicate an interest in promotion to team leader or production staff. He points to no evidence that there were any vacant team leader, production staff or quality group positions open in MAP Weld that year or the first half of 1991.

In 1991, Bacon marked his 1990 associate self-progress report to indicate an interest in promotion to production staff, team leader and the quality group. Bacon also requested a

transfer to MAP Assembly in order to work first shift. Bacon Dep., p. 88. That transfer was granted effective on May 13, 1991. Bacon Dep., p. 91. Bacon was ineligible for promotion to team leader from May 13, 1991 to May 13, 1992 due to the twelve-month department seniority requirement, and was therefore not considered for team leader positions which were posted in MAP Assembly during that period. Bacon has not shown that he could prove that he met the minimum qualifications for these positions, since he lacked the requisite department seniority.

On October 23, 1991, Bacon submitted the first of five CIAs which he has filed. Bacon Dep., pp. 305-6. He was interviewed by the Purchasing Department for a position but was notified on April 23, 1992 that the position have been given to another candidate. Plaintiff has pointed to no evidence indicating the race of this person, a necessary element of plaintiff's prima facie case. Bacon was informed by Henry Turner, an African-American coordinator in the Purchasing Department who had participated in the interview, that Turner had misunderstood an answer which plaintiff had given during the interview and therefore thought that the plaintiff's answer was incorrect. Bacon Dep., pp. 315-26. There is no evidence that this reason given for selecting another candidate was a pretext for race discrimination.

In 1992, Bacon marked his 1991 associate self-progress report to indicate an interest in promotion to team leader and production staff positions. As previously indicated, beginning in 1992, there were no promotions of production associates to production staff in MAP Assembly. Vacancies for the team leader position in 1992 occurred prior to May of that year, while Bacon was ineligible for promotion due to the department seniority requirement. Thus, he has not shown that he was qualified for these positions. There were no

promotions to team leader from May to December of 1992 in MAP Assembly. Defendant's Memorandum Contra Class Certification, Ex. Z, Mathys Affid., ¶5.

In December of 1992, Bacon marked his 1992 associate self-progress report to request promotion to production staff, team leader and office support staff. In 1993, team leader promotions occurred in January, June, and September, but Bacon did not meet the minimum requirements for those positions. He did not have one hundred percent attendance and was counseled for falling below ninety-eight percent attendance on September 22, 1993, and although he had completed one NH Circle while in MAP Weld, he had not completed an NH Circle within the preceding twenty-four months of the posting. Bacon Dep., p. 230; Ex. Z, Mathys Affid., ¶7. Thus, Bacon has not shown that he could prove he was qualified for these positions. There were no promotions to team leader in MAP Assembly from October of 1993 to September of 1994. Ex. Z, Mathys Affid., ¶11.

There is no evidence that Bacon had a CIA on file for promotion to nonproduction departments during 1993 and the first five months of 1994. He has not shown that any production associate who did not have a CIA on file was considered for a position in the nonproduction departments. Therefore, he has not shown that he applied for or was considered for any of these positions, an element of his prima facie case.

In 1994, Bacon indicated an interest in promotion to office support staff on his 1993 associate self-progress report. There were promotions to team leader in September and December of 1994. However, Bacon did not indicate an interest in the team leader position on his associate self-progress report, and from September 1994 through April, 1995, only associates

who indicated an interest in that position were considered. Ex. Z, Mathys Affid., ¶¶12-13. Therefore, Bacon has not shown that he applied for or was considered for any of these positions, an element of his prima facie case.

Bacon filed his second CIA on June 7, 1994, and was interviewed in August of 1994 for a position in the Purchasing Department. Bacon did not have the required ninety-eight percent attendance and was counseled for having less than ninety-eight percent attendance on August 8,1994, and therefore he did not meet the minimum qualifications for that position. Defendant's Motion for Summary Judgment on Bacon Claims, Ex. D., McGinnis Affid., ¶4. He was encouraged by Turner to apply again when his attendance improved. Bacon Dep., pp. 320-22. Daniel Scanlon, a white candidate, met the minimum attendance requirement and was awarded the position. McGinnis Affid., ¶6. Bacon has not shown that he could prove he was qualified for this position, an element of his prima facie case.

In 1995, Bacon marked his 1994 associate self-progress report to indicate an interest in promotion to production staff, office support staff and the Purchasing Department. There were promotions to team leader in June and September of 1995 and February of 1996. Bacon did not indicate an interest in promotion to the team leader position on his 1994 associate self-progress report, and only those associates who indicated an interest were considered. Therefore, Bacon has not shown that he applied for and was considered for these positions. There is no evidence that any associate was promoted during this period who had not indicated an interest in promotion on his annual associate self-progress report or filed a Supplemental promotion interest form.

The only promotion of a production associate to the Purchasing Department in 1995 occurred on September 21, 1995. Bacon's CIA had expired on June 7, 1995. Defendant's Motion for Summary Judgment on Bacon Claims, Ex. A, Althouse Affid. Bacon has not produced evidence that he applied for or was considered for that position, or that the person who was awarded the position did not have an active CIA.

In 1996, Bacon marked his 1995 associate self-progress report to indicate an interest fn promotion to office support staff and exempt staff. Team leader vacancies were filled in May, July and September of 1996. Bacon did not indicate an interest in the team leader position and in fact signed a form indicating that he was not interested in taking the MAP Assembly team leader test which was a prerequisite for promotion to team leader in MAP Assembly from 1996 through April of 1997. Bacon Dep., pp. 278-280. Bacon has not shown that he applied for, was considered for or was qualified for the team leader positions filled in 1996. There is no evidence that any production associate was promoted in MAP Assembly who had not taken and passed the team leader test.

On February 19, 1996, Bacon filed his third CIA. There were no promotions of production associates to the Purchasing Department between February 19, 1996 and February 19, 1997, while this CIA was in effect. Defendant's Motion for Summary Judgment on Bacon Claims, Ex. A., Althouse Affid.

Bacon transferred to MMP Assembly effective February 3, 1997. He was ineligible for promotion to team leader and production staff in that department until February 3, 1998 due to the twelve-month department seniority requirement. He

marked his 1996 associate self-progress report to request promotion to office support staff. Thus, he has not shown that he applied for or was considered for the team leader position in 1997.

Bacon submitted his fourth CIA on December 1, 1997. During the year this CIA was in effect, one production associate, Lance Soliday, was promoted. The evidence does not reveal the race of this person; therefore, Bacon has not shown he can prove that element of his prima facie case. In addition, Tanya Bell, the recruiter responsible for facilitating the selection process for this position, stated that Soliday was chosen because he had a bachelor's degree. Defendant's Motion for Summary Judgment on Bacon Claims, Ex. B, Bell Affid., ¶4. Bacon stated that he has completed college courses towards a degree, but he acknowledged that he does not have a college degree. Bacon Dep., p. 340. He has offered no evidence that the legitimate reason offered as to why Soliday was chosen for the position, that being because he had a bachelor's degree, was false or a pretext for discrimination.

In December of 1997, Bacon marked his 1997 associate self-progress report to request promotion to production staff or team leader. Beginning on April i, 1998, production associates were required to submit a Team Leader/Production Staff Pool Interest Form in order to be considered for promotion. Defendant's Memorandum Contra Class Certification, Ex. B, Patterson Affid., ¶11. Bacon did not submit this form and was not considered. Therefore, he has not shown that he applied for or was considered for any team leader positions after April of 1998. There were also no promotions of production associates to team leader or production staff in MMP Assembly from July 17, 1998, the commencement of the limitations period for his Title vii

claim, until February 18, 2000, the date of the first amended complaint in this case.

In 1999, Bacon marked his 1998 associate self-progress report to indicate an interest in promotion to office support staff. Bacon sent a letter dated June 15, 1999 to the Administration Department requesting to be considered for team leader the next time the team leader test was given. Bacon Dep., p. 481. He did not recall seeing the announcement concerning the test in July of 1999, although he did remember seeing papers on the board near the team leader's desk at that time and was certain that it was announced at the morning shift meeting. Bacon Dep., pp. 491-92. Bacon testified that he understood that associates were required to respond to the posting of a test by filing a pool interest form, and that he was at work on the day that the pre-shift memorandum regarding the dates for the test was read. Bacon Dep., pp. 501-4. He never submitted the required pool interest form. Bacon Dep. 492-93. Instead, he sent another letter to the Administration Department on August 12, 1999. He spoke with Dave Huber on August 19, 1999, and Huber informed him that there was a pre-shift memorandum that announced the dates for the test, which had already been given. Bacon Dep., p. 494; Defendant's Memorandum Contra Class Certification, Ex. 28.

Bacon has offered no evidence that nonminority employees who had not submitted the required pool interest form or who had not passed the test were considered for promotion to team leader. He has offered no evidence from which a jury could reasonably find that he was denied the opportunity to submit the form or take the test due to his race.

Bacon filed his fifth CIA on May 12, 1999. He interviewed for a position in the Purchasing Department on

September 23, 1999. That position was awarded to Natalie Harris, an African-American female who had a bachelor's degree and recent relevant experience with another company. Defendant's Motion for Summary Judgment on Bacon Claims, Ex. B, Bell Affid., ¶¶2-3. Other production associates promoted to the Purchasing Department during the year this CIA was in effect included Chris Debell, white, promoted June 3, 1999, who had a bachelor's degree and recent relevant experience with another employer, Brad Haggis, white, promoted July 22, 1999, who had an associate's degree and recent relevant purchasing experience with another company, Greg Speck, white, promoted October 7, 1999, who had a bachelor's degree, and Kelly Heitkamp, white, promoted January 13, 2000, who had an associate's degree, an extensive computer background and experience in shipping and receiving at Honda. *Id.*, ¶¶ 5-7; Ex. C., Holdheide Affid., ¶2. While Bacon argues that his course work towards a bachelor's degree should weigh more that a completed associate's degree, this is a matter within the business judgment of the defendant. This argument also ignores the fact that the candidates with associate's degrees also had relevant work experience. Bacon has offered no evidence to show that the legitimate reasons offered by the defendant for promoting these other individuals to the positions in the Purchasing Department were false or a pretext for discrimination.[8]

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[8] The court notes that the statistical evidence of promotions of production associates to the Purchasing Department from 1994 to January 13, 2000 does not bolster Bacon's case. During that period, seventeen production associates were promoted, including twelve Caucasians, four African-Americans and one unknown. The percentage of African-American production associates promoted was thus either slightly over or slightly under twenty-five percent, a figure which substantially exceeds 8.73%, the percentage of African-American production associates in Honda's workforce

3. Disparate Treatment in Promotions - Harden

Plaintiff Harden was hired on September 19, 1988 as a production associate in MAP Paint, second shift. He did not meet the eighteen-month Honda seniority requirement until March of 1990. In 1990, he marked his 1989 evaluation indicating an interest in promotion to team leader or production staff. He marked his 1990 associate self-progress report to request promotion to production staff or team leader. In March of 1991, he requested a transfer to MAP Assembly in order to work first shift. Harden Dep., pp. 22-23. This transfer was granted effective May 20, 1991. The plaintiff points to no evidence that there were any promotions to team leader or production staff in MAP Paint during the period he was employed there.

There were promotions in MAP Assembly during the period between July of 1991 and April of 1992. However, Harden was ineligible for these positions until May 20, 1992 due to the twelve-month department seniority requirement. He has not shown that he was qualified for these positions. There were no promotions to team leader in MAP Assembly from May to December of 1992. As indicated above, starting in 1992, there were no promotions from production associate to production staff in MAP Assembly. Defendant's Memorandum Contra Class Certification, Ex. Z, Mathys Affid., ¶5.

In 1993, Harden marked his 1992 associate self-progress report to request a promotion to production staff or a quality

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from June of 1994 to July of 1999 as calculated by Dr. McClave. *See* Defendant's Memorandum Contra Class Certification, Ex. 210, McClave Affid., Table 5.

department. He did not check the box indicating an interest in promotion to team leader, although the form contained language stating that he would not be considered for promotion to that position if he failed to indicate an interest in it. Defendant's Memorandum Contra Class Certification, Ex. 66. Harden did not meet the requirements for the team leader positions posted in 1993, which required one hundred percent attendance and the completion of an NH Circle within-the past twenty-four months. Harden Dep., pp. 236-38; Ex. Z, Mathys Affid., ¶8. The candidates who were promoted met those criteria. Id., ¶9. Harden has failed to show he could prove a prima facie case in regard to these positions. There were no promotions to team leader in MAP Assembly from October of 1993 to September of 1994. Ex. Z, Mathys Affid., ¶11.

Harden was told that to qualify for a promotion to a quality department, he was required to take tests and be placed in a pool. Harden Dep., p. 198. He took the quality pool tests, received a passing score, and was entered in the pool. According to the affidavit of Perry H. Hodies, a coordinator in the Administration Department, quality pools were created in 1993, 1995 and 1997, and used a blind file review process (which did not reveal the name or race of the candidate) to select candidates for the Phase II interview. Defendant's Motion for Summary Judgment on Harden Claims, Ex. C., ¶¶9, 11. Harden was never selected for a Phase II interview. Harden has not shown how intentional discrimination based on race could have been a factor in his nonselection in light of this blind selection process.

Harden marked his 1993 associate self-progress report to indicate an interest in production staff, maintenance equipment service staff or a quality department. He did not indicate an interest in the team leader position and was therefore not eligible for that position, since from September 1994 through

April, 1995, only associates who indicated an interest in that position were considered. Ex. Z, Mathys Affid., ¶¶12-13. Harden has not shown that he was qualified for and considered for these team leader positions, and has not met his prima facie case.

Harden marked his 1994 associate self-progress report to indicate an interest in promotion to office support staff or the Production Control Department. Harden filed a CIA on October 13, 1994 requesting a promotion to the Production Control Department. This is the only CIA which Harden has filed. In 1995, while this CIA was in effect, three production associates were awarded positions in the Production Control Department. Daryl Watson, African-American, and Steven Zimmerman, white, were given positions in the Logistics Group of the Production Control Department. According to Kimmie Keifer, a coordinator who participated in the interviews, these individuals were selected because they had extensive experience in the Material Service Department, including knowledge of Honda's supply processes and distribution systems which would be relevant to their new job, which involved working with suppliers in connection with the coordination and distribution of parts. Defendant's Motion for Summary Judgment on Harden Claims, Ex. B, ¶2. There is no evidence that Harden ever worked in the Material Service Department. Harden has submitted no evidence that these legitimate reasons offered by the defendant for selecting these other candidates were false or a pretext for discrimination.

A third production associate, Se Keun Han, Asian, was given a position in 1995 in the Specification Control Group of the Production Control Department. This candidate was selected because he had a bachelor of science degree in engineering, a master's degree and experience with new

model projects at ELP Paint. These qualifications were relevant because the position involved coordinating blueprints and technical drawings and distributing changes in blueprints and technical drawings resulting from new model design changes or other design changes. Keifer Affid., ¶3. Harden had no college degree, nor is there any evidence that he had experience with new model projects. He has produced no evidence that the legitimate reasons given for the promotion of this candidate were false or a pretext for discrimination.

In 1995, Harden applied for entry into the 1995 quality pool. Under the blind selection process, he was not selected for a Phase II interview. He has not shown how this could be attributed to race discrimination in light of the blind file review system.

There were promotions to team leader in June and September of 1995 and February of 1996. Harden did not indicate an interest in promotion to the team leader position on his 1994 associate self-progress report, and only those associates who indicated an interest were considered. Therefore, Harden has not shown that he applied for and was considered for these positions, so as to demonstrate a prima facie case.

In 1996, Harden marked his 1995 associate self-progress report to indicate an interest in promotion to exempt staff. In April of 1996, Harden received a form asking if he desired to take the department test for the team leader position, and he Signed the form indicating that he wanted to take the test. He took the team leader test for MAP Assembly on April 8, 1996, but received a score of 63. Between May through September of 1996, a score of 75 was required to be eligible for promotion, and in February, 1997, a score of at least 74 was required. Defendant's Memorandum Contra Class

Certification, Ex. R, Gardner Affid., ¶3. This test was used until March 30, 1997. Harden has not shown that he was qualified for the team leader openings which were based on this test. There is no evidence that the test papers of African-Americans were scored any differently than those of white associates who took the test. No candidate who scored at or below Harden's level on this test moved on in the promotion process. Ex. R, Gardner Affid., Ex. A.

In 1997, Harden marked his 1996 associate self-progress report to indicate an interest in promotion to team leader or production staff. Harden never returned the form indicating that he wanted to take the team leader test in 1997 and he did not take the test that year. Since passing the test was a condition for promotion, he was ineligible for promotion to team leader in MAP Assembly from May, 1997 to March, 1998. Ex. R., Gardner Affid., ¶4. Harden has not shown that he was qualified for the team leader positions open that year. He has produced no evidence that white associates who failed to complete the form or take the test were promoted.

Harden applied for and was entered into the 1997 quality pool. However, no production associates were selected for promotion from that pool from March of 1997 to February 18, 2000, the date of the filing of the first amended complaint. Defendant's Motion for Summary Judgment on Harden Claims, Ex. C., Hodies Affid., ¶11.

In 1998, Harden marked his 1997 associate self-progress report to indicate an interest in promotions in general, although he checked no specific boxes. Beginning on April I, 1998, production associates were required to submit a Team Leader/Production Staff Pool Interest Form in order to be considered for promotion. Defendant's Memorandum Contra Class Certification, Ex. B, Patterson Affid., ¶11. Harden

testified that although he heard rumors about changes in the promotion process in 1998, he did not follow up by asking his team leader or coordinator. Harden Dep., pp. 384-85, 392. Harden never completed a team leader/production staff pool interest form. Harden Dep., pp. 384, 388, 391; Defendant's Memorandum Contra Class Certification, App.A, Tab K, Willie Hale Affid., ¶13. He did not take the team leader assessments or tests which were required as of April, 1998. Thus, he has not shown that he applied for, was considered for, or was qualified for promotion to the position of team leader in 1998.

In 1999, Harden marked his 1998 associate self-progress report to indicate an interest in promotion to office support staff. The record includes an announcement to be read on September 21, 1999 concerning forms for expressing an interest in the team leader/production staff promotion pool, which had to be submitted no later than October 8, 1999, and assessments or tests which were to be administered the week of October 25, 1999. Defendant's Memorandum Contra Class Certification, Ex. 91. Harden testified that he did not see the notice, and that he heard about the test from his wife, who also worked in MAP Assembly, around October 2, 1999. Harden Dep., pp. 412-18. He did not file a pool interest form. Harden was absent from work on bereavement leave from October 3, 1999 to October 21, 1999, and inquired about taking the assessments when he returned. He was not permitted to take the tests. However, he has produced no evidence that any nonminority associate who failed to return a promotion pool interest form by the specified deadline was permitted to take the assessments, or that the decision not to allow him to take the assessments was based on his race. He has not shown that he properly applied for, was considered for, or was qualified for team leader positions in 1999. There is no evidence that Harden filed the required team

leader/production staff promotion pool interest form prior to the filing of his charge with the Equal Employment Opportunity Commission ("EEOC") and his inclusion in the first amended complaint filed on February 18, 2000.

4. Disparate Treatment in Promotion Claims - Other Evidence

In support of their disparate treatment claims, the plaintiffs have submitted a variety of other evidence which they contend shows a pattern or practice of discrimination in promotions on the part of the defendant.

a. Attendance System

A minimum attendance record is one criterion used to determine eligibility for promotion in some departments. The plaintiffs claim that Honda's attendance system is intentionally manipulated to give nonminorities favored treatment in excusing late clock-ins or absences. Honda maintains a computerized system of attendance whereby absences or late clock-ins automatically register in the computer system as an "occurrence" on the employee's attendance record. According to J.R. Cunningham, an assistant manager in the Administration Department, an occurrence can be excused either by approved leave,[9] or, at the election of the employee, by the use of accrued vacation time. Defendant's Memorandum Contra Class Certification, Ex. D, Cunningham

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[9] Approved leave may consist of leave under the Family and Medical Leave Act, medical leave, family leave, personal leave, military leave, bereavement leave, jury duty, court-ordered appearances, and workers' compensation proceedings. *See* 1998 Associate Handbook, Defendant's Memorandum Contra Class Certification, Ex. 236.

Affid., ¶4. In addition to having two weeks off during the plant shutdowns in July and at the end of the year, Honda associates with at least one year's seniority have an additional eighty to one hundred and sixty hours of vacation per year, depending on length of service. Associates can use up to five days of vacation as "call-in vacation" in two-hour increments to cover unscheduled absences, and can use up to eight hours of vacation in four-hour increments for "late occurrence coverage" to cover instances in Which they are less than one hour late for work. *Id.*, ¶5.

The Administration Department is responsible for determining whether to grant an excused absence such as family and medical leave to cover the occurrence pursuant to uniform policies. *Id.*, ¶6. However, it is the choice of the associate whether to take an occurrence or cover their absence with accrued vacation. *Id.*, ¶5. Department management has no discretion to forgive an absence by a non-exempt associate, and the computer will record an occurrence for a full or partial day's absence unless the absence is covered by vacation or approved leave. *Id.*, ¶7.

Plaintiffs have offered analyses performed by Dr. McClave, the plaintiffs' statistics expert, which attack the application of defendant's attendance criterion for promotion. In his affidavit of September 29, 2000, Dr. McClave examined 3,547 late clock-in occurrences, and found that although African-Americans had 15.7% of late clock-in occurrences, they had only 8.84% of excused late clock-in occurrences. He determined that while thirty percent of late clock-ins by non-African-Americans were excused, only sixteen percent of late clock-ins by African-Americans were excused. Defendant's Memorandum Contra Class Certification, Ex. 211, ¶36.

However, Dr. McClave's analyses fail to take into account the fact that it is a matter of employee choice whether to use vacation time to excuse a late clock-in occurrence. It does not take into account associates who are not interested in promotion and who value their vacation time over a perfect attendance record, and who therefore choose not to conserve or use vacation time to cover late occurrences.

The plaintiffs conjecture that the disparity in the excuse of occurrences must be due to the fact that department managers are somehow able to circumvent the computer system without authorization to delete the occurrence in the computer from the associate's record, or that late clock-ins by whites are more readily excused as some other type of approved leave by the Administration Department. However, they offer no evidence to support these speculations. The evidence indicates that department management has no discretion to forgive an absence by a non-exempt associate, and there is no evidence that computer records are tampered with by department managers. There is also no evidence that the Administration Department applies more stringent criteria to the attendance issues of African-Americans when approving other types of leave such as family or medical leave. Dr. McClave's analysis does not establish disparate treatment in the administration of the attendance system.

b. Department Seniority

The plaintiffs next point to another analysis performed by Dr. McClave which, according to plaintiffs, shows that the department seniority promotion criterion has been ignored on numerous occasions and is a sham. In his affidavit of November 8, 2000, Dr. McClave claims to have found 187 instances where team leaders were moved from one department to another. Defendant's Memorandum Contra

Class Certification, Ex. 212, ¶8. When Dr. Bernard Siskin, the statistics expert retained by the defendant, observed that two of the department codes found in the data base were in fact the same department and one code was a special project code, Dr. McClave adjusted his findings and concluded that the data base showed 120 instances involving 107 employees of a team leader moving from one department to another. Ex. 212, ¶9.

In his affidavit of October 16, 2000, Dr. Siskin observes that Dr. McClave initially did not confine his analysis to the promotion of production associates to team leader or production staff in production departments, and included promotions of non-production associates and promotions of production associates to non-production departments or jobs which had no seniority requirement. Defendant's Memorandum Contra Class Certification, Ex. Q, Siskin Affid., ¶67. He further notes that Dr. McClave misunderstood the significance of the special project code, where employees working on such projects were given the same seniority credit they would receive working in their own department, and that he did not take into account departmental reorganizations where the department codes changed but the jobs remained the same. *Id.* Dr. Siskin states that of the seventy-eight cases involving production associate promotions to team leader or production staff in production departments, only eight possible violations of the seniority requirement are shown by the data, and that in six of those eight cases, total departmental seniority may have been counted as satisfying the seniority requirement even though one year of continuous seniority was not present. *Id.*, ¶68. Plaintiffs offer no evidence from Dr. McClave to rebut these explanations.

Even assuming that the department seniority rule was ignored on occasion, the plaintiffs have pointed to no specific

instances where they or any other African-American did not receive a promotion to a team leader or production staff position in their department for which they would have been qualified but for the department seniority requirement, but that a white person who did not meet the department seniority requirement was in fact promoted to that position. Dr. McClave's analysis is insufficient to raise a genuine issue of fact on the question of whether Bacon and Harden were treated differently in the enforcement of the department seniority requirement.

c. NH Circle and VIP System

Plaintiffs argue that the VIP System, including the NH Circle requirement for promotion, is susceptible to use as a tool for disparate treatment because the award of points under these systems includes a subjective element. However, plaintiffs point to no evidence indicating that they were the victims of disparate treatment in the application of the VIP or NH Circle promotion requirement. There is no evidence that on those occasions when the plaintiffs were not eligible for promotion because they had not completed an NH Circle within the previous twenty-four months, this requirement was waived for white applicants. Even assuming that there is some subjective component to the number of points given for suggestions under the VIP program, there is no evidence that the plaintiffs were awarded fewer VIP points than their white counterparts for similar suggestions.

There is also no evidence that the plaintiffs were ever discriminated against because of their race in regard to joining an NH Circle. Bacon testified that he was asked by his coordinator to join an NH Circle in Weld. Bacon Dep., pp. 134-37. Harden testified that he completed an NH Circle while he was in MAP Paint, and that he had participated in

several other groups which never completed their projects because of member attrition. Harden Dep., pp. 149, 152.

Both Bacon and Harden testified that participation in the VIP Program and NH Circles is voluntary, and that if an associate could get a group of people to work on a project, the group would get approval to proceed. Bacon Dep., pp. 430-31; Harden Dep., p. 150. Bacon participated in one NH Circle while he was in MAP Weld, but had not been involved in any others. Bacon Dep., p. 431. He acknowledged that he had not submitted a VIP suggestion since 1996. Id., p. 390. Harden stated that he had been denied entry into NH Circle groups, but only because the group already had the maximum number of associates permitted to work with the group. Harden Dep., pp. 154-55. There is no evidence that the plaintiffs were denied the opportunity to form an NH Circle when white associates were allowed to form a circle to work on a similar project.

The plaintiffs complain about the fairness of using participation in the VIP Program as a criterion for promotion since participation in the VIP Program is voluntary. However, this is a matter of business judgment. It is not unreasonable for Honda to select managers from employees who have shown enough interest in the operations of the company in the past to work overtime on special projects when, as managers, they will be expected to work overtime and address any problems which arise. There is no evidence from which a reasonable jury could find that the VIP Program or the NH Circle requirement operated as an instrument of disparate treatment against the plaintiffs in the matter of promotions or otherwise.

d. The "Buddy System"

The plaintiffs allege that a "buddy system" is in operation at Honda whereby supervisors select their friends for promotion. Even assuming that a "buddy system" exists at Honda, cronyism or a "good old boy" network does not necessarily violate Title VII. *See Foster v. Dalton*, 71 F.3d 52, 56 (1st Cir. 1995) (title VII does not outlaw cronyism, and cronyism can constitute an alternative nondiscriminatory explanation for employment action); *Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079, 1096 (6th Cir. 1996) (allegations of nepotism, even if proven, would not constitute evidence of impermissible discrimination under Title VII or § 1981); *Maryland Troopers Ass'n, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993) (evidence of cronyism, apart from any racial animus, not racial discrimination); *Zachery v. Texaco Exploration and Production, Inc.*, 185 F.R.D. 230, 236 (W.D.Tex. 1999) ("good old boy" network does not necessarily violate Title VII).

The plaintiffs offer examples of what they contend is the "buddy system" in operation. In their motion for class certification, they pointed to the hiring of Scott Whitlock and Susan Insley and the assignment of Kim Smalley as plant manager at MAP, but offered no evidence that the hiring or promotion of these exempt employees was in fact due to the "buddy system" rather than the superior qualifications of these employees. They also rely on comments made in response to the 1995 Associate Satisfaction Survey. However, these comments reflect nothing more than feelings or perceptions and are inadmissible hearsay if considered for the truth of the matter asserted therein. *Pittsburgh Press Club v. United States*, 579 F.2d 751, 759 (3d Cir. 1978).

The plaintiffs' expert, Dr. Philip Way, an economist, reviewed survey comments concerning the "buddy system" but he acknowledged that he had no way of knowing whether the comments in this anonymous survey were made by African-Americans, whether they relate to discrimination based on race, or whether they are factually accurate. Way Dep., pp. 140-144, 170-171. The plaintiffs' mere conclusory statements concerning the existence of a "buddy system" is not sufficient to create a genuine issue of fact in an employment discrimination case. *Herron v. International Ass'n of Bridge, Structural and Ornamental Iron Workers*, 134 F.3d 371 (unreported), 1998 WL 45483 (6th Cir. 1998).

There is also evidence that contradicts the plaintiffs' allegations that the "buddy system" was the preferred method of promotion at Honda. The record indicates that promotion of production associates to the position of team leader or production staff depended on a number of objective as well as subjective factors. A production associate seeking the team leader or production staff position has to meet a variety of objectively determined requirements, including a minimum seniority at Honda and in the department, a minimum attendance requirement, no managerial level counselings for the previous twelve months, recent completion of an NH Circle or participation in the rip program, and achieving a passing score on a department test or assessment. The Administration Department at Honda reviews promotion decisions to ensure that the promotion was made in accordance with the criteria of the promoting department. There is no evidence that the "buddy system" ever operated to waive these requirements.

Rick Gardner testified that while he was in charge of promotions at MAP Assembly from 1994 to 1997, he devised a system of putting together an interview team of four

supervisors. He would drop the lowest interview score, then take the average of the remaining three scores in an effort to dispel any perception that the "buddy system" was in operation. Gardner Dep., p. 91. Gardner testified that he heard someone refer to the "buddy system" on one occasion, but that he had never received a complaint about it. *Id.*, pp. 92-93.

Even assuming that the "buddy system" exists at Honda, there is no evidence that it has a racial component. In addition, Bacon and Harden have offered no evidence that they were ever denied a promotion due to the "buddy system." This evidence does not create a genuine issue of fact supporting plaintiffs' disparate treatment claims.

e. Promotion Analyses - Dr. McClave

Plaintiffs also rely on a number of promotion analyses conducted by Dr. McClave. They note McClave's segregation analysis which shows how Honda's African-American employees are distributed over Honda's workforce in the five categories of office and clerical workers, semi-skilled operatives, craft workers, professionals, and officials and managers. *See* Defendant's Memorandum Contra Class Certification, Ex. 210, McClave Affid., ¶16 and Figure 1; Ex. 211, McClave Affid., ¶¶7-10. This analysis shows that African-Americans make up a higher percentage of the workforce in the lower-paid categories of operatives and office workers than in the higher level jobs of professionals and managers, with skilled workers being the lowest percentage.

However, employers are not required under Title VII to place a uniform distribution of any group of workers across job categories or to set quotas for each job category. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652 (1989). "It is

completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988). As noted by Dr. Frank Landy, an industrial psychologist retained by the defendant to review its promotion practices, many factors besides discrimination can come into play in determining job assignment, including employee choice, age, qualifications, and level of education, experience or skills, transfers of employees and the number of promotion opportunities in the departments. Defendant's Memorandum Contra Class Certification, Ex. 196, p. 106-07. It also says nothing about the efforts of the plaintiffs to gain promotion to the positions of team leader and production staff, which are in the same category (operatives) as production associates. This analysis provides no support for the plaintiffs' disparate treatment claims.

The plaintiffs also note Dr. McClave's labor pool analysis, in which he compares, for the period 1990-1988, the percentage of African-American associates employed at Honda in the categories of officials and managers (2.2%) and skilled craft workers (1.4%) with the percentage of African-Americans in executive, administrative and managerial occupations (6.9%) and precision production, craft and repair occupations (5.8%), as reported in the 1990 United States Census, who were employed in a labor market which includes twelve Ohio counties. See Ex. 210, McClave Affid., ¶¶18-20 and Table I; Ex. 211, McClave Affid., ¶¶11-14.

In order for such statistical comparisons to be probative, the relevant statistical pool for purposes of demonstrating the discriminatory exclusion must be the number of minorities qualified to fill the particular position where special qualifications are necessary to perform the job. *City of*

Richmond v. J.A. Croson Co., 488 U.S. 469, 501-2 (1989); *Alexander v. Fulton County, Georgia*, 207 F.3d 1303, 1327 (11th Cir. 2000). *See also Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977) (proper comparison was between racial composition of school's teaching staff and racial composition of qualified public school teacher population in relevant labor market); *Middleton v. City of Flint, Mich.*, 92 F.3d 396, 408 (6th Cir. 1996) (statistical comparison not reliable indicator of discrimination where population sample is too general to constitute a relevant statistical pool).

Dr. Siskin notes in his affidavit that while some of the occupations listed in the general census categories used by Dr. McClave are relevant to jobs at Honda, others are not. Ex. Q, Siskin Affid., ¶59 and Table 31.[10] Dr. Landy noted that the job categories chosen by Dr. McClave included jobs with "extreme differences" in such factors as the kind of technical knowledge or level of physical exertion, manual dexterity and hand-eye coordination required, educational requirements

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[10] For example, Table 31 reveals that the census category of executive and administrative occupations includes such occupations as legislators, public administrators, postmasters, funeral directors, underwriters, construction inspectors, and purchasers of farm products. The craft and repair occupations include, among others, those of telephone line installers and repairers, farm equipment mechanics, locksmiths, repairers of household appliances, office machines, cameras, watches, shoes and musical instruments, any number of construction-related occupations including carpenters, brickmasons, electricians, painters and paperhangers, plumbers and roofers, furniture finishers, dressmakers and tailors, dental laboratory technicians, butchers, bakers, and sewage plant operators.

(education being a reflection of the personal preference of the applicant) and licensing requirements. Defendant's Memorandum Contra Class Certification, Ex. 196, Landy Report, pp. 109-110. Dr. McClave did not study the work performed or the skills required of associates working in the job categories he selected and merely selected broad census job categories he believed were the best match for the "officials and managers" and "craft workers" job categories at Honda. McClave Dep., pp. 226-36. Since so many persons with dissimilar skills and qualifications have been included in the labor pool being compared to Honda's labor force, Dr. McClave's labor market analysis is insufficient to show that the disparity in the percentage of African-American employees in a particular job category at Honda must be due to discrimination.

Dr. McClave also performed several promotion analyses. The first analyses included a study of promotions awarded to African-American and non-African-America employees, both exempt and nonexempt. *See* Ex. 210, McClave Affid., ¶¶22-24. Dr. McClave concluded that a statistically significantly lower percentage of promotions were given to African-Americans than to non-African-Americans from June, 1994 to July, 1999, and from June, 1990 to July, 1999.

According to Dr. Siskin, this analysis fails to compare similarly situated employees because it groups exempt (managerial level) and non-exempt employees, and does not account for the employee's job, department, seniority, or other factors bearing on eligibility for promotion. See Ex. Q, Siskin Affid., ¶60. Dr. Siskin also noted that Dr. McClave did not take into account the amount of time that an employee has worked at Honda, thereby assuming that an employee who had only worked at Honda for a year was just as likely to be promoted as one with four years seniority, and did not

consider the fact that African-Americans were hired at different rates in different years. *Id.*, ¶61.

Dr. Siskin indicates that from 1990 to 1998, the operative non-exempt positions of production associate, production staff and team leader comprised 72.7% of Honda's workforce, and production associates made up 77.1% of the total non-exempt workforce. *Id.*, ¶¶ 7-8. These figures indicate that a substantial percentage of the individuals included in Dr. McClave's analysis are not similarly situated with production associates such as the plaintiffs. Dr. McClave's analysis, which includes employees of all different levels, both managerial and non-managerial, performing widely diverse job assignments in departments with differing promotion needs, is simply too general to enable a trier of fact to conclude that the plaintiffs, as production associates in MAP Assembly, were exposed to disparate treatment in their particular departments. *See Middleton*, 92 F.3d at 408 (statistical comparisons are not reliable indicators of discrimination where population sample is too general to constitute a relevant statistical pool); *Mitchell*, 964 F.2d at 583 (to prove disparate treatment, plaintiff must show that he was treated differently than similarly situated non-minority employees and that the comparable employees are similarly situated in all respects).

Dr. McClave also performed an analysis which examined only the promotion of African-American and non-African-American production associates over the period of July, 1994 to June, 1999, and from June, 1990 to July, 1999. Ex. 210, McClave Affid., ¶¶25-27. In this analysis, the persons included in the survey are similarly situated to the extent that they are all production associates, but at that point the similarities end. Production associates were lumped together regardless of which department they worked in, or which

department they were promoted to (quality departments, production or non-production departments, or exempt jobs), or who made the promotion decision. *See* Ex. Q, Siskin Affid., ¶62.

The analysis was not confined to production associates who were otherwise qualified for or interested in promotion. *See United States v. City of Miami, Fla.*, 115 F.3d 870, 873 (11th Cir. 1997) (statistical evidence must examine the number of employees of a given race qualified and interested in promotion); *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1290 (5th Cir. 1994) (required comparison is to qualified pool of employees presumptively eligible for promotion). Dr. McClave treated all production associates in any department as being equally eligible for all promotions to team leader or production staff in any department, even though they are only eligible for such promotions in their own department, and even though there were no promotions of production associates to production staff positions in MAP Assembly where Bacon and Harden have worked. Dr. McClave also failed to confine his analysis to those production associates interested in promotion to team leader. There is evidence that many production associates were simply not interested in promotion to team leader because the pay for the team leader position was not significantly higher than that of production associates, because team leaders are routinely required to work overtime and are occasionally required to travel, and because of the desire to avoid the aggravation inherent in being a supervisor over other employees.

Dr. Landy states in his report that the promotional practices and opportunities at Honda differ from department to department, from plant to plant, and over time. Ex. 196, Landy Report, p. 5660. According to Dr. Siskin, aggregation of statistics for purposes of gauging disparate impact is only

appropriate if the same employment practice is being analyzed. Ex. Q., Siskin Affid., ¶14-21. He also states that an analysis of disparate treatment requires that the groups being compared are similarly Situated, and that they are subject to a common decision process. *Id.*, ¶¶22-25. *See Doan v. Seagate Technology, Inc.*, 82 F.3d 974, 979 (10th Cir. 1996) (plaintiffs' statistical evidence must focus on eliminating nondiscriminatory explanations for the disparate treatment by showing disparate treatment between comparable individuals).

Relying on Dr. Landy's opinion that, with the exception of the ninety-eight percent minimum attendance and no managerial level counseling requirements, the remaining criteria for promotion differed from department to department, Dr. Siskin concluded that combining an analysis of promotion factors across departments would be inappropriate. *Id.*, ¶¶27-29. Dr. Siskin conducted an analysis of the promotions in five sample departments, including ELP Assembly, ELP Paint, AEP Assembly, MAP Paint and MAP Assembly, and found no adverse impact in promotions. *Id.*, ¶¶30-35.

Dr. McClave criticizes Dr. Siskin's analysis as suffering from a fragmentation problem, that is, where the use of smaller subsamples minimizes disparities, and also challenges the decision to examine only five departments. Ex. 211, McClave Affid., ¶¶1819, 28. However, one of the sample departments, MAP Assembly where Bacon and Harden worked, is the largest department at Honda, employing over eighteen hundred associates. *See* Ex. 196, Landy Report, Table 3C. There has been no showing that such a sample size is too small to yield statistically meaningful comparisons.

McClave also performed an analysis which looked at the rate of promotion in the various departments. *See* Ex. 211, McClave Affid., ¶¶26-28. However, this analysis just

revealed the rate of promotions of associates by department, and took into account no other factors. Therefore, the associates included in the study were not confined to those who were actually interested in or applied for promotion and who met the other qualifications for promotion, such as department tests.

Dr. McClave also did an analysis based on a 1996 memorandum to Honda Senior Vice President Dave Nelson and Senior Manager Rick Schostek by Chan Cochran and Susan Insley concerning production associate promotions within the past twelve months, which showed that .66% of African-Americans received promotions, compared to 3.79% non-African-Americans. See Defendant's Memorandum Contra Class Certification, Ex. 210, McClave Affid., ¶32; Exs. 224, 225. Dr. Siskin criticizes this analysis on the basis that the data relied on by Dr. McClave only isolates production associates who met the Honda eighteen-month seniority requirement and expressed an interest in promotion, without considering any of the other criteria for promotion and without doing a separate analysis for each department. Ex. Q, Siskin Affid., ¶¶73-74. The data in question, bearing the date October, 1996, covers a twelve-month period and identifies promotions of production associates by plant but not by department. If, for example, the four African-American production associates promoted at MAP during this period all worked in MAP Assembly and some of the 137 non-African-Americans promoted at MAP did not work in MAP Assembly, this would effect whether there was a disparity in MAP Assembly during this period.[11] In its current form, the analysis

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[11] The court also notes that in 1995 and 1996, neither Bacon nor Harden indicated an interest in promotion to team leader on their associate self-progress reports, and that Harden did not pass the

is not probative of disparate treatment in MAP Assembly where the plaintiffs worked.

Dr. McClave performed an analysis which purports to compare the average time to promotion for African-Americans and non-African-Americans. Ex. 210, McClave Affid., ¶33. Within this analysis, he includes all production associates who were hired on or after January 1, 1990, who were production associates on or after July 1, 1994, and who were promoted at some point after July 1, 1994. This analysis excludes all associates hired before January 1, 1990 who may have been promoted after that date. It also excludes all production associates who were hired after January 1, 1990 but were promoted prior to July 1, 1994. Thus, in calculating the average time to promotion, the shorter times to promotion of persons hired after January 1, 1990 but promoted prior to July 1, 1994 were not included, but the longer times to promotion of persons hired after January 1, 1990 and promoted after July 1, 1994 were included, thus skewing the results toward a longer average period of time to promotion.

Dr. Siskin criticizes this analysis and notes that by including associates hired after January 1, 1990 in the population of associates, but not including promotions which occurred before July 1, 1994, Dr. McClave creates a distorted picture of time to promotion for all persons hired before July 1, 1994, and the average time to promotion is biased upward. Ex. Q., Siskin Affid., ¶¶75-76. Dr. Siskin performed an analysis for each year from July 1, 1985, and July 1, 1994.

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team leader test given in MAP Assembly in *1996*. Therefore, they would not have been included in this data in the group of production associates who indicated an interest in promotion, and would not have been qualified for promotion.

He found a significant difference in time to promotion in only two years, those being 1989 and 1990, and found that in 1985 and 1986, African-Americans appeared to be promoted faster. *Id.*, ¶76. Dr. Siskin noted that the problem in Dr. McClave's analysis could be corrected simply by including promotions of African-American associates between January 1, 1990 and July 1, 1994 in the data. Dr. Siskin performed this revised analysis and found no significant disparity in the time to promotion of African-American production associates. *Id.*

The court also notes that Dr. McClave's analysis on the amount of time to promotion of production associates does not appear to be limited to those production associates who are otherwise qualified for promotion or interested in promotion. As such, it falls short of being probative of disparate treatment.

The next analysis performed by Dr. McClave studied the promotion of non-exempt employees to exempt status from July, 1994, to June, 1999 and found that non-African-Americans were twice as likely to be promoted to exempt positions. Ex. 210, McClave Affid., ¶¶34-35. Dr. Siskin notes that Dr. McClave included all non-exempt employees in this study as being equally likely to receive a promotion to an exempt job regardless their position or how long they were employed. Ex. Q., Siskin Affid., ¶77. Dr. McClave includes production associates in the analysis even though production associates do not have a direct promotion path to exempt positions. Dr. Siskin states that such aggregation is inappropriate because associates in different jobs are not subject to common decision-making or employment patterns or practices, and because a production associate is not equally likely as a production staff employee to be promoted to an exempt job. *Id.* He states that when the analysis is controlled

for job and time, and the data is then aggregated, no significant deviation is found. *Id.*

In his rebuttal report, Dr. McClave also performed an analysis of production associates who were promoted from July, 1994 through June, 1999, eliminating from the pool those production associates who did not meet the requirements of eighteen months service at Honda, ninety-eight percent attendance over the past twelve months, twelve months in the department, and no manager level counselings in the past twelve months. Ex. 211, McClave Affid., ¶40. This analysis is not limited to production associates who were actually interested in or applied for promotion and who met any of the other qualifications for promotion, such as department tests.

The court concludes that even if Dr. McClave's analyses are accepted at their face value, they simply do not go far enough. Dr. McClave's promotion and workforce analyses fall short of isolating the appropriate statistical pools of comparably situated associates for comparison and do not adequately control for nondiscriminatory factors. These analyses do not constitute probative evidence sufficient to create a genuine issue of fact as to the disparate treatment claims of plaintiffs Bacon and Harden.

f. Other Alleged "Pattern or Practice" Evidence

The plaintiffs also refer to other evidence which they contend establishes that the defendant followed a pattern or practice of discrimination which is probative of their disparate treatment claims. The plaintiffs point to a 1988 conciliation agreement between Honda and the EEOC as constituting evidence that Honda engaged in a practice of discrimination. However, under 42 U.S.C. § 2000e-5(b), this agreement may

not be used as evidence. That section provides in relevant part:

> If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned.

42 U.S.C. § 2000e-5(b). Proposals and counter-proposals of compromise made by the parties during the EEOC's efforts to conciliate fall within the protection of that section. *Branch v. Phillips Petroleum Co.*, 638 F.2d 873 (5th Cir. 1981). See also *Lindsey v. Prive Corp.*, 161 F.3d 886, 895 (5th Cir. 1998) (employer letter to EEOC which did not contain purely factual material relating to the merits of the charge properly excluded).

Even assuming that the 1998 conciliation agreement does not fall within the scope of § 2000e-5(b), it does not qualify as evidence relevant to the plaintiffs' disparate treatment claims. The agreement does not prove that Honda engaged in discrimination prior to 1988, but even if it did, both Bacon and Harden commenced their employment with Honda in 1988 after the conciliation agreement was signed. The fact that Honda entered into an agreement in 1988 which was designed to address allegations of past discrimination does not establish that Honda violated the agreement or engaged in discriminatory practices after the plaintiffs were hired. The

1988 conciliation agreement does not constitute evidence supporting the plaintiffs' disparate treatment claims.

The plaintiffs note the fact that Honda executives were invited to give congressional testimony in 1991 concerning discrimination in major corporations. This does not constitute evidence that Honda was itself engaged in discriminatory practices. There is no evidence that Honda management made any admissions at these hearings concerning any alleged practices of race discrimination at Honda. Plaintiffs do not point to any portion of the hearings which would tend to prove the charges of disparate treatment in this case. This evidence is insufficient to create a genuine issue on the plaintiffs' disparate treatment claims.

The plaintiffs also refer to a report of the Glass Ceiling Commission. This report discusses the creation of a "glass ceiling" barrier to the promotion of minorities by businesses, but makes no reference to Honda. Therefore, it is not relevant to the plaintiffs' claims of discrimination in this case.

The plaintiffs note the 1991 Management Development Project conducted by Pam Jones-Morton which enabled her to meet thirty-nine associates in the upper management level and to determine what these individuals thought about management development. According to Jones-Morton, this project did not address the issue of race discrimination and did not reach any conclusions concerning that issue. Jones-Morton Affid., ¶17. The plaintiffs have submitted, as Exhibit 16, a chart which they contend summarizes the results of this project. Jones-Morton denies preparing the chart and states that it is inconsistent with her conclusions. Jones-Morton Affid., ¶¶14, 16. The chart indicates that ninety-four percent of the persons interviewed had concerns about a need for "workforce diversity awareness." There is no indication of what

"workforce diversity awareness" means in this context. There is no evidence that it reflects a concern about existing discriminatory practices. Thus, even if this exhibit is considered, this ambiguous and undefined reference to "workforce diversity awareness" does not establish that Honda engaged in a pattern or practice of race discrimination against African-Americans.

The plaintiffs refer to a number of surveys which have been conducted. For example, the plaintiffs note a 1994 "Respect For the Individual - Situation Appraisal," an informal, unscientific questionnaire which was distributed by two Honda associates in 1994 to forty-seven persons they selected, including acquaintances both inside and outside Honda. The plaintiffs have also submitted documents relating to a 1994 Saperstein anonymous survey, which included comments about race,[12] favoritism and the "buddy system." Plaintiffs' Ex. B-420. The race of the associates making these comments is not disclosed, although at least one person spoke against granting promotions based on race or gender quotas. The evidence includes documents from a Saperstein "focus group" which contain the phrase "buddy system." Plaintiffs also refer to the 1995 Watson Wyatt Associate Satisfaction Survey of Honda associates. This survey used open-ended questions and was answered by associates anonymously. Some of the participants in this survey made comments concerning the "buddy system."

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[12] The only comment in this report which was specific as to any particular race was that of one individual (race unknown) who expressed a desire to see more African-American managers.

The anonymous comments made in response to these surveys simply contain perceptions or opinions. Whether these opinions have any basis in fact as opposed to hearsay, rumors or misperceptions is not disclosed. The answers to such surveys constitute unreliable hearsay. The vague and conclusory references to the "buddy system" and favoritism are insufficient to establish that such a system exists at Honda. However, as previously noted, even assuming that it does, these comments concerning the "buddy-system," which make no reference to race, are insufficient to show that the alleged or perceived cronyism was based on race. This survey evidence of general perceptions concerning discrimination at Honda is insufficient to create a genuine issue of fact as to whether Bacon or Harden were subjected to disparate treatment based on their race.

The plaintiffs have also submitted a memorandum entitled "Certain Minority Issues" which was prepared by a public relations firm which examined perceptions of Honda by persons outside Honda. For example, plaintiffs' Exhibit H-109 reflects the receipt of comments concerning the "buddy system" and favoritism on the part of management. This evidence reflects no more that the hearsay opinions of persons outside Honda concerning perceived discrimination at Honda, with no demonstration of how or whether these opinions are founded in fact. It is irrelevant to the plaintiffs' claims of disparate treatment and insufficient to show the existence of a pattern or practice of race discrimination at Honda.

g. Report of Dr. Way

Dr. Philip Way conducted a review of Honda's promotion system, based largely on the Honda Associate Handbook, depositions of three Honda employees, the 1994 Respect for the Individual survey and the 1995 Watson Wyatt survey, and

Dr. McClave's analyses. See Plaintiffs' Motion for Class Certification, Way Decl., Ex. B-316, ¶6. Dr. Way stated that in his opinion, the disparity in the promotion rates of African-Americans and non-African-Americans was "more likely than not" caused by Honda's promotion system. *Id.*, ¶14. He *criticized* the use of subjective criteria and noted survey comments concerning the "buddy system." *Id.*, ¶¶11-13. Dr. Way concluded that the process as a whole is unfairly discriminatory, but he did not isolate the individual effects of the various factors involved in the promotion process. Way Dep., p. 124. He performed no analyses himself, but rather based his opinions on Dr. McClave's analyses. He did not look at the success rates of African-American and non-African-American associates on any of the promotion criteria. *Id.*, p. 174. In his report, he relies heavily on the results of the Watson Wyatt survey and the Respect for the Individual questionnaire.

Dr. Landy criticizes Dr. Way's methodology, noting that he failed to take into account the differences between the plants, departments and jobs at Honda, the fact that the departments used different promotion processes which changed over time, or the individual preferences or interest of the associates in particular jobs. Defendant's Memorandum Contra Class Certification, Ex. 196, Landy Report, p. 79, 98-99. Dr. Landy notes that Dr. Way failed to consider hypotheses other than race discrimination or to examine whether the promotion discrepancies could be explained by job-related factors other than race, such as ability or performance differences, personal preference and lack of interest. *Id.*, pp. 80-83. He also criticizes Dr. Way's reliance on the survey comments, including statements concerning the "buddy system," which were given in response to open-ended questions, as being a measure of objective reality rather than an expression of attitudes and perceptions. *Id.*, pp. 87-93.

Dr. Way relied on limited data and did not purport to examine the promotion practices of the departments in which Bacon and Harden worked. To the extent that Dr. Way relies on the analyses of Dr. McClave or on the survey evidence, his report suffers from the same shortfalls and weaknesses noted above in regard to that evidence. The report of Dr. Way is insufficient to raise a genuine issue of fact in regard to the disparate treatment claims of Bacon and Harden.

h. Subjective Criteria Used in Promotion Decisions

The plaintiffs challenge the use of subjective factors in the promotion decisionmaking process. The use of subjective elements in making employment decisions is not necessarily invalid. The Supreme Court in *Watson*, 487 U.S. at 991, 999, recognized that traits such as common sense, good judgment, originality, ambition, loyalty and tact often must be assessed in a subjective fashion but are essential to one's success as a supervisor, and rejected the idea of enjoining the use of subjective criteria. Employment decisions may legitimately be based on subjective criteria as long as those criteria are capable of some objective evaluation and are stated with a sufficient degree of particularity. *Joe's Stone Crab*, 220 F.3d at 1280 n.17.

The plaintiffs challenge the use of subjective criteria in defendant's system of discipline, attendance, the VIP system, and the interview process. As noted above, there is no evidence sufficient to establish that the plaintiffs in this case were subjected to disparate treatment in the administration of defendant's attendance or VIP system. In regard to the interview process, there is no evidence that Harden ever went through a Phase II interview where subjective judgment might be exercised. Bacon was interviewed for positions in the Purchasing Department, but, as discussed above, the

defendant has offered evidence of its legitimate, nondiscriminatory reasons for selecting other candidates on those occasions which have not been rebutted by the plaintiffs.

The factor of managerial-level counseling within the preceding twelve months is one promotion criterion which the plaintiffs attack as being subjective. The plaintiffs have presented evidence of an analysis by Dr. McClave that African-American associates are counseled or disciplined at a higher rate than non-minorities. See Defendant's Memorandum Contra Class Certification, Ex. 210, McClave Affid., Table 8. According to Table 8, which analyzes counselings from July I, 1994 to June 30, 1999, the great majority of these counselings, 79.62%, were for attendance policy violations. No evidence has been presented that any of these counselings were unwarranted or the result of disparate treatment, nor does this analysis disclose the level at which these violations were counseled or to what extent they actually had an impact on promotions.[13] The analysis is not confined to managerial level counselings, which, prior to April, 1998, was the criterion used in determining eligibility for promotions.

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[13] It is hard to see how a disciplinary system with some degree of subjective discretion built in to allow consideration of the unique circumstances of each violation could be regarded as per se discriminatory or disadvantageous to employees. In any event, Honda's disciplinary system is not unfettered. J.R. Cunningham testified at the class certification hearing that the Associate Relations Department reviews all coordinator counselings, and various measures, such as conferences between coordinators and managers and the maintenance of a violation data base, are taken to insure the imposition of similar discipline for similar conduct. Cunningham, who is African-American, stated that he had investigated claims of race discrimination in disciplinary matters and had never found a valid case of discrimination.

The plaintiffs also assert that lack of counseling is not a genuine factor in the promotion process, noting Dr. McClave's report that during the period from July, 1994 to June, 1999, twenty-two employees who had been counseled during the past twelve months were promoted. See Ex. 210, McClave Affid., ¶28. However, according to Dr. Siskin, the rule in effect during the period relevant to McClave's analysis was that the associate have no counseling at the manager level, and none of the twenty-two employees identified by Dr. McClave had managerial counseling within the preceding twelve months.[14] Defendant's Memorandum Contra Class Certification, Ex. Q, Siskin Affid., ¶69; Ex. A, Garrett Affid., ¶II. The plaintiffs have offered no evidence to contradict Dr. Siskin's explanation. Further, although Bacon was counseled at the coordinator level for having less than ninety-eight percent attendance on September 22, 1993 and August 8, 1994, see Defendant's Memorandum Contra Class Certification, Exhibits 9, 14, there is no evidence that Bacon and Harden were ever denied a promotion due to counselings.

Dr. Way attacks the use by Honda of subjective criteria in awarding promotions. See Plaintiff's Motion for Class Certification, Ex. B-316, ¶¶11-13. He states that many of the criteria, such as employee evaluations, participation in the VIP Program, and counseling, involve subjective decisions, and, noting employee survey results, he further states that the

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[14] Honda's disciplinary system has graduated levels. The first level of counseling is by the production coordinator, and may consist of either counseling or coaching, a lesser level. The second level of counseling is administered by Honda's Associate Relations Department. The third level of counseling is the managerial level. The system gives supervisors some discretion in determining the appropriate level of counseling for any particular violation.

associates perceived the application of the promotion criteria as being subjective.

Dr. Landy questions the validity of Dr. Way's conclusions. Dr. Landy notes that 'Dr. Way, in his deposition, p. 84, acknowledged that attendance, on its surface, was objective.[15] Defendant's Memorandum Contra Class Certification, Ex. 196, Landy Report, p. 95. Dr. Landy comments that in looking at the department seniority requirement, Dr. Way relied on Dr. McClave's early promotion analysis, which is based, as uncontroverted evidence discussed above shows, on an erroneous reading of the promotion data. *Id.*, p. 95. Dr. Landy observes that in criticizing the subjectivity of manager-level counseling, Dr. Way does not take into account the graduated nature of Honda's disciplinary system and the fact that manager-level counseling involves input from the coordinator and a representative from the Associate Relations Department. *Id.*, p. 97. Dr. Landy indicates that Dr. Way's criticism of the structured interview process is not supported by the research in the field, which supports the use of such interviews as valid predictors of job success. *Id.*, pp. 97-98.

Dr. Way's opinions concerning the subjective elements of Honda's promotion processes are conclusory at best, rendered after a review of limited evidence of questionable reliability, such as anonymous survey comments concerning the amorphous "buddy system." He fails to identify any specific evidence which indicates that the use of subjective criteria has

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[15] *See also* Defendant's Memorandum Contra Class Certification, Ex. D, Cunningham Affid., ¶12 ("There are objective policies which determine the level of discipline received for violations of [Honda's] attendance policies.")

operated to discriminate against African-Americans in the matter of employee evaluations or the award of VIP points; Dr. McClave performed no analysis concerning these factors. As noted previously, Dr. McClave's analysis of employee counselings was not confined to managerial-level counselings, and there is no evidence that the counselings were unwarranted, or that the subjective component of counselings given African-American associates operated to discriminate against them on the basis of race in the award of promotions.

As noted previously, the use of subjective factors in making employment decisions has been recognized as valid by the Supreme Court. *Watson*, 487 U.S. at 991, 999. Further, Dr. Way's opinions concerning Honda's use of subjective criteria is of no support to Bacon and Harden's disparate treatment claims because neither has shown that they were ever denied promotions due to the role of subjective decisionmaking in any promotion criteria such as a poor employee evaluation, the failure to accumulate sufficient VIP points, or counseling.

Although some of the promotion criteria used by Honda in making promotions may include subjective elements, the plaintiffs have not shown that these subjective criteria are not capable of some objective evaluation or are not stated with a sufficient degree of particularity. See *Joe's Stone Crab*, 220 F.3d at 1280 n.17. The evidence is insufficient to show that any of these partially subjective criteria have been used to deny promotions on the basis of race, either in the cases of plaintiffs Bacon and Harden, Or as a matter of policy or practice, and the plaintiffs' general attack on these criteria does not support plaintiffs' disparate treatment claims.

5. Conclusion

Considering the totality of the evidence, including the documents, testimony and opinions offered by the plaintiffs as pattern and practice evidence, considered both individually and cumulatively, the court concludes that no reasonable trier of fact could find in favor of plaintiffs Bacon and Harden on their claims of disparate treatment in promotion, and no genuine issue of material fact has been shown to exist in regard to those claims.

III. Disparate Impact Claims

The plaintiffs also assert claims of discrimination under the disparate impact theory. A disparate impact claim under Title VII is established where a particular employment practice has caused a significant adverse effect on a protected group. *Ward's Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 657 (1989). The disparate impact model is used to analyze discrimination claims involving employment practices that are "facially neutral in their treatment of different groups but...in fact fall more harshly on one group than another and Cannot be justified by business necessity." *Teamsters*, 431 U.S. at 333-36 n. 15 (1977). The disparate impact method of proof is used to analyze objective factors which are utilized by an employer in making employment decisions, but it may also be applied to claims alleging discrimination based on an employer's subjective decisionmaking, although the use of subjective criteria in decisionmaking is not discriminatory per se. *Watson*, 487 U.S. at 989.

To establish a prima facie case of disparate impact, the plaintiffs are not required to prove discriminatory intent,[16] but must: (i) identify a specific employment practice; (2) identify a racial imbalance in the workforce; and (3) show that the specific employment practice is responsible for the statistical disparities. *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977 (1988).

The plaintiff in a disparate impact case must demonstrate that the employer uses a particular employment practice that causes a disparate impact on the basis of race. 42 U.S.C. §2000e-2(k) (I)(A)(i). This is accomplished by demonstrating disparities through statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. *Watson*, 487 U.S. at 987, 994; *Joe's Stone Crab*, 220 F.3d at 1274-75.

Once the plaintiff establishes the adverse effect, the burden shifts to the employer to demonstrate that the challenged practice is a business necessity. *United States v. City of*

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[16] For this reason, it has been held that a plaintiff may not assert a disparate impact claim under § 1981, since a claim of discrimination under that section requires proof of discriminatory intent. See *Oliver v. Digital Equipment. Corp.*, 846 F.2d 103, III (1ST Cir. 1988) (citing *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982)). Rather, disparate impact claims are authorized under Title VII. They also may be brought under Ohio Revised Code Chapter 4112, see *Albaugh v. City of Columbus, Division of Police*, 132 Ohio App.3d 545, 725 N.E.2d 719 (1999), although punitive damages may not be recovered in the absence of proof of actual malice. See *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 704 N.E.2d 1217 (1999).

Warren, Mich., 138 F.3d 1083, 1091 (6th *Cir.* 1998); 42 U.S.C. § 2000e-2(k) (I) (A) (i). If the employer is successful at establishing a business necessity defense, the plaintiff may still prevail by proving that other means or devices which do not entail an undesirable racial effect would be equally effective in serving the employer's legitimate interests, and that the employer's practices were a pretext for discrimination. *Ward's Cove*, 490 U.S. at 66061; 42 U.S.C. § 2000e-2(k) (I) (A) (ii).

A plaintiff generally cannot rely on the overall decision-making process of the employer as a specific employment practice. *Id.* at 656-58. Rather, the plaintiff must demonstrate that each particular challenged employment practice causes a disparate impact. See *Watson*, 487 U.S. at 994 (plaintiffs are required to identify a specific employment practice, rather than rely on bottom line numbers in an employer's workforce). The plaintiffs must present statistical evidence "of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Id.* However, "if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k) (I) (B) (i). See *City of Warren*, 138 F.3d at 1093-94 (relaxing specificity requirement where such statistical proof was unattainable, where plaintiffs presented alternative statistics demonstrating that two unlawful practices converged to discourage black applicants, and where the evidence presented demonstrated a grossly discriminatory impact).

Plaintiffs who present a statistical analysis of some challenged practice need not rule out all other variables to

prevail. *Id.* at 1094. However, in offering statistical evidence, the plaintiff must eliminate the most common nondiscriminatory reasons for the disparity. *Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036, 1045 (7th Cir. 1991). The plaintiffs need not take into account all measurable variables, but must include the major factors potentially responsible for any disparity. *Id.*

In their memorandum contra Honda's motions for summary judgment, plaintiffs Bacon and Harden have noted various practices employed by Honda in the promotion process which allegedly have an adverse impact on African-American production associates. The plaintiffs note the fact that there is no application process for a particular position, and they complain about the alleged existence of a "buddy system." They argue that there is no evidence that the assessments or tests which are used as a criteria for promotion in some departments, including MAP Assembly where both Bacon and Harden have worked, have any correlation with an applicant's ability to perform as a team leader. The plaintiffs allege that the promotional requirements of ninety-eight (or, in some cases, one hundred) percent attendance, twelve to eighteen months departmental seniority and lack of disciplinary counseling within the previous twelve months all have an adverse impact on the promotion of African-American production associates at Honda. The plaintiffs also attack the subjective components of criteria such as attendance and participation in the VIP Program or completion of an NH Circle.

A. Standing

A threshold issue raised by the defendant is whether plaintiffs Bacon and Harden have standing to assert claims about practices which allegedly had an adverse impact upon

some African-Americans if evidence is lacking that those practices had any adverse effect on those two plaintiffs. Disparate impact claims may be brought by individual plaintiffs. *Munoz v. Orr*, 200 F.3d 291, 200 (5th Cir. 2000). However, in *Coe v. Yellow Freight System, Inc.*, 646 F.2d 444, 451 (10th Cir. 1981), the court stated:

> Where the disparate impact doctrine has been used by the courts in individual actions rather than class actions, a plaintiff has been required to show that he personally has been the victim of discrimination by the general practice which allegedly resulted in a discriminatory impact on a protected group. It is not sufficient for an individual plaintiff to show that the employer followed a discriminatory policy without also showing that plaintiff himself was injured .... To hold otherwise would be to allow the plaintiff to avoid the fundamental requirements for constitutional standing in addition to failing to establish the fundamentals of disparate impact.

See also *Drake v. City of Fort Collins*, 927 F.2d 1156, 1161 n. 6 (10th Cir. 1991) (plaintiff had no standing to complain about hiring criteria which did not factor into the rejection of his application); *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1016-17 (1st Cir. 1984) (upholding judgment for employer where individual plaintiffs failed to show causal connection between criterion which allegedly had a disparate impact on minorities and the plaintiffs' layoffs); *Carpenter v. Board of Regents of University of Wisconsin System*, 728 F.2d 911, 915 (7th Cir. 1984) (plaintiff in disparate impact case must show that he was injured by the policy, such as a promotion test, alleged to have had a disparate impact); *Howard v. New Jersey Dept. of Civil Service*, 667 F.2d 1099, 1101-1103 (3d Cir. 1981) (plaintiffs who were ineligible because they failed

written civil service examination required of all police officer candidates could not assert disparate impact claim in regard to physical agility test).

There is no evidence that Bacon and Harden have ever been denied a promotion due to counseling, or that they were ever deprived of a promotion due to the failure to post a particular position or due to the operation of a "buddy system."[17] Therefore, the plaintiffs have failed to show that they have standing to challenge the disparate impact of these promotion practices or requirements.

Bacon and Harden have been denied eligibility for promotion based on other factors. Harden was ineligible for promotion in 1996 through March 30, 1997 due to his failure to pass the MAP Assembly test. Bacon and Harden were both ineligible for team leader positions posted on August 17, 1993 and awarded on September 9, 1993 due to their failure to have one hundred percent attendance within the past twelve months and their failure to have completed an NH Circle within the

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[17] The evidence also fails to show that either of these practices had a disparate impact on African-Americans. Plaintiffs point to no statistical analysis demonstrating that the inability to apply for a specific position on a specific shift or the operation of a "buddy system" had an adverse impact on African-Americans. Dr. McClave did perform one analysis looking only at the number of counselings of African-Americans between July, 1994 and June, 1999, and found that African-Americans v ere counseled at a higher rate than their percentage in the workforce, but this analysis was not confined to managerial level counselings, the relevant promotion criteria, and did not examine the impact of managerial level counselings on the promotion opportunities of African-Americans. See Defendant's Memorandum Contra Class Certification, Ex. 210, McClave Affid., ¶31.

past twenty-four months. Bacon was ineligible for promotion for one year due to the department seniority requirement following his transfers on May 13, 1991 and February 3, 1997, and Harden was ineligible for promotion for one year due to that requirement following his transfer on May 20, 1991.

Bacon's ineligibility for promotion in 1993 due to the failure to have one hundred percent attendance and to have completed an NH Circle in the preceding twenty-four months occurred within the limitations period applicable to his Ohio law claims, and he therefore has standing to assert disparate impact claims under Ohio law as to those requirements. All of the other instances of Bacon's and Harden's ineligibility for promotion discussed in the preceding paragraph occurred prior to the limitations period for the plaintiffs' Title VII claims, and the plaintiffs' 1991 transfers and Harden's ineligibility for promotion in 1993 predate the limitations periods for the Ohio claims. To the extent that these events occurred prior to the relevant limitations periods, these claims are time-barred and cannot provide a basis for standing. See *Carter v. West Publishing Co.*, 225 F.3d 1258, 1267 (11th Cir. 2000) (plaintiff lacks standing to assert Title VII claim where EEOC charge was untimely). However, in the interests of judicial economy, the court will also examine these claims to determine if they will survive under a disparate impact analysis.

B. Attendance Requirement

The plaintiffs contend that the attendance requirement, usually ninety-eight Percent, has an adverse impact on African-Americans. At Honda, the associate's attendance percentage is calculated on a rolling twelve-month basis. The attendance percentage is obtained by dividing the number of

days worked by the number of days available. Defendant's Memorandum Contra Class Certification, Ex. D, Cunningham Affid., ¶9. Associates are continually reminded of the importance of having at least ninety-eight percent attendance, and Honda pays attendance bonuses to those non-exempt associates who have perfect attendance on a monthly basis. *Id.*, ¶10.[18]

In his affidavit of September 29, 2000, Dr. McClave examined 3,547 late clock-in occurrences, and found that although African-Americans had 15.7% of late clock-in occurrences, they had only 8.84% of excused late clock-in occurrences. He determined that while thirty percent of late clock-ins by non-African-Americans were excused, only sixteen percent of late clock-ins by African-Americans were excused. Defendant's Memorandum Contra Class Certification, Ex. 211, ¶36. He also determined that for the period from July, 1994 to June, 1999, the percentage of African-Americans failing to meet the ninety-eight percent attendance criterion is significantly higher than the percentage of non-African-Americans with less than ninety-eight percent attendance. *Id.*, ¶37.

However, Dr. McClave's analyses fail to take into account the fact that it is a matter of employee choice whether to use vacation time to excuse a late clock-in occurrence. See *Long v. City of Saginaw*, 911 F.2d 1192, 1198-1202 (6th Cir. 1990) (noting that failure to consider nondiscriminatory explanations

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[18] This incentive apparently works, because, according to the 1998 version of the Honda Associate Handbook, Defendant's Memorandum Contra Class Certification, Ex. 236, 98.5% of Honda's associates earned attendance bonuses in 1997, resulting in the payment of a total of $17,727,392 in attendance bonuses.

for disparities for minority turnover rate in police department, such as high noncoercive turnover from voluntary terminations, retirements, or illnesses; may result in significant statistical distortions). The analyses do not take into account associates who are not interested in promotion and who value their vacation time over a perfect attendance record and therefore choose not to conserve or use vacation time to cover late occurrences. See *Doan*, 82 F.3d at 979 (statistical evidence which fails to properly take into account nondiscriminatory explanations does not permit an inference of discrimination). It does not show how many otherwise interested and qualified African-American production associates versus non-African-American production associates were denied a promotion opportunity due to the attendance requirement. Although the attendance requirement is calculated by looking at the associate's attendance record for the twelve months immediately preceding the promotion opportunity, not for a particular calendar year, Dr. McClave did not confine his analysis to the associate's attendance percentage as of the dates of actual promotions. There is no evidence that a statistical analysis of the impact of the attendance requirement on interested and eligible production associates could not have been performed.

In addition to the fact that the plaintiffs have failed to show that they could prove a prima facie case of disparate impact in regard to the attendance requirement, an employee's attendance record may be a legitimate and necessary criterion in weighing the qualifications of promotion candidates. There is ample authority for the proposition that the failure of an employee to maintain satisfactory attendance is a legitimate, nondiscriminatory reason for discharging an employee. *See, e.g., Cowan v. Glenbrook Sec. Services, Inc.*, 123 F.3d 438, 445 (7th Cir. 1997); *Aramburu v. The Boeing Co.*, 112 F.3d

1398, 1403 (10th Cir. 1997) ; *Rush v. McDonald's Corp.*, 996 F.2d 1104, 1115 (7th Cir. 1992).

In this case, there is evidence which indicates that the attendance requirement is a business necessity, particularly in regard to the team leader position. Dr. Landy discusses the attendance promotion requirement in his report:

> This criterion is very appropriate within [Honda's] environment. Associates are informed of the importance of attendance from their earliest days in the organization, even prior to hire. Attendance is critical in production departments because missing associates have to be replaced in order for production to proceed. Given the lean staffing model used by [Honda], this means that a TL or Coordinator may have to leave his/her own responsibilities to fill in if a Production Associate is unavailable.

Defendant's Memorandum Contra Class Certification, Ex. 196, Landy Report., p. 66.

In a discussion of the attendance bonus program, the 1998 Associate Handbook, Exhibit 236, page 31, states: "[Honda] hires only the number of associates needed to meet work scheduling demands." The Handbook further states at page 41, that Honda "does not hire more associates than necessary, therefore, it is vital that each associate maintains excellent attendant. [Honda] expects a minimum of 98% attendance." In light of the nature of its business, it is reasonable for Honda to conclude that a production associate with an unreliable attendance record will be a poor candidate for a team leader who must be available to fill in for absent production associates. The plaintiffs point to no evidence of any criteria which would reasonably assure Honda's interests in obtaining

team leaders and other supervisory employees whose attendance will be reliable, but which would have less of an impact on minorities.

The evidence is insufficient to show that the plaintiffs could prove that the attendance requirement results in a disparate impact on African-American candidates for promotion.

C. Department Seniority Requirement

In their complaint, the plaintiffs claimed that African-Americans were denied transfers, although they submitted no evidence to support this allegation. The plaintiffs now claim that African-Americans are transferred more frequently than other employees, and that as a result, the production department seniority requirements have an adverse impact on African-Americans. They rely on an analysis by Dr. McClave, who determined that from July, 1994 to June, 1999, 7.8% of the employees at Honda were African-American, and 8.69% of associate transfers were by African-Americans. In other words, during this period, African-Americans transferred at a slightly higher rate than their percentage in the workforce. Dr. McClave opines that since the difference between the 7.8% population of African-Americans in the workforce and their 8.69% share of transfers amounts to more than two standard deviations, this indicates that the enforcement of the departmental seniority requirement would adversely impact the eligibility of African-Americans for promotions. Ex. 210, McClave Affid., ¶30. He also notes that transfers could be used to limit the promotion possibilities of African-Americans by transferring them more frequently, thereby making them susceptible to the department seniority limitation on promotions. *Id.*

Dr. McClave includes all Honda employees, not just production associates, in this analysis. Thus, the sample would encompass African-Americans who transfer under circumstances where the department seniority requirement does not apply, such as those who transfer into a non-production department which has no department seniority requirement. Dr. Siskin notes that Dr. McClave fails to take into account the fact that the minimum department seniority requirement would affect not only employees who transfer from one department to another, but also newly hired employees. Ex. Q, Siskin Affid., ¶71. Dr. Siskin also comments that some African-American employees who transfer may not be interested in promotion, or may be otherwise unqualified for promotion, or may not receive a promotion within a year of transfer in any event due to the lack of job openings. *Id.*, ¶70. Statistical comparisons are not reliable indicators of discrimination where the population sample is too general to constitute a relevant statistical pool. *Middleton*, 92 F.3d at 408.

Dr. Siskin also states that to ascertain whether the department seniority requirement has an adverse impact, it is necessary to determine the percent of African-Americans and non-African-Americans whose opportunity for promotion was actually delayed by the requirement. Ex. Q., Siskin Affid., ¶71. Simply examining the number of transfers does not achieve this goal. Statistical evidence which fails to properly take into account nondiscriminatory explanations does not permit an inference of discrimination. *Doan*, 82 F.3d at 979. There is no evidence that the statistical sample of African-Americans included in this analysis could not have been narrowed to include only eligible African-Americans interested in promotion.

Dr. McClave's analysis also fails to demonstrate that Honda deliberately transfers African-American associates to frustrate their chances of promotion through the use of the department seniority requirements. There is no evidence that any of the transfers by African-Americans noted by Dr. McClave were involuntary transfers. For example, Bacon's and Harden's original transfers to MAP Assembly were voluntary moves from second shift to the more desirable first shift, and Bacon voluntarily transferred to MMP Assembly for enhanced job and promotion opportunities. If Honda had denied these transfer requests, it would have been accused of discrimination in the award of transfers. Dr. Landy states in his report, Exhibit 196, p. 105, that a "voluntary transfer should be considered a positive action on the part of the organization and reflects the statement of a preference by the associate." Landy further noted that Dr. McClave acknowledged in his deposition, p. 358, that he did not attempt to determine whether the transfers were requested by the associates, and that Dr. McClave should have considered the impact of voluntary versus involuntary transfers and performed separate analyses. *Id.*, pp. 105, 115.

The record also includes evidence that the department seniority requirement is job related. Dr. Frank Landy quoted Assistant Vice President Tim Garrett in his report as describing the importance of the team leaders and production staff having a "process memory," that is, a knowledge of the machinery and its integration into the department production process, as well as a familiarity with how production line output must be coordinated with tasks performed by other production departments. Defendant's Memorandum Contra Class Certification, Ex. 196, Landy Report, p. 64; Ex. A, Garrett Affid., ¶¶8, 14. Landy also received comments about the fact that each department requires specific knowledge of its processes, tasks, technology, safety issues, job

assignments, performance expectations, the needs of individual workers in the department, and its interactions with other departments. *Id.*, pp. 63-64. Landy also notes that there is support for seniority requirements in the scientific literature, in that such requirements: 1) acknowledge the value of job experience which results in the acquisition of skills, techniques, and methods that produce improvement in performance capabilities independent of increases in job knowledge; and 2) give the supervisors who make promotion decisions an adequate time to observe and evaluate the candidate's performance. *Id.*, pp. 64-65. The plaintiffs have pointed to no evidence that Honda could achieve the goals reached by the use of the department seniority requirement through some other method which would have a lesser impact on minorities.

The evidence submitted by the plaintiffs is insufficient to establish a prima facie case of disparate impact caused by the department seniority requirement.

D. Department Tests or Assessments

The plaintiffs argue that the defendant is under an obligation to validate any department test which was required of the plaintiffs to assure that these tests were relevant to the position sought and that they did not have an adverse impact on African-Americans. However, plaintiffs have presented no statistical evidence that any department test had an adverse impact on African-Americans. Dr. Landy stated in his report that trade tests administered at Honda are written tests of the knowledge specifically required within a department, and they are not comparable across departments, nor does any one department necessarily use the same test from year to year. Ex. 196, Landy Report, p. 69. Therefore, any meaningful statistical analysis would have to specifically address each test.

There is evidence that the MAP Assembly test which Harden did not pass in 1996 was job related. Rick Gardner, the manager who was in charge of putting together the MAP Assembly test from 1994 to 1997, testified that the test reflected the training and instruction given every day to employees about the operations of the department and how to perform their jobs. Gardner Dep., p.46. The plaintiffs have failed to show that they could prove a claim of adverse impact in regard to department tests.

E. NH Circles

According to the 1998 version of the Associate Handbook, Exhibit 236, page 33, Honda encourages associates to be involved in its daily operations "with an emphasis on constant improvement and associate development which contributes to the overall success and future of Honda through" activities such as the NH Circle. The Handbook further states that all Honda non-exempt associates are eligible to be team members in an NH Circle. There is no evidence, statistical or otherwise, which demonstrates that the promotion criterion of recent completion of an NH Circle has had an adverse impact on African-American production associates interested in promotion.

F. Conclusion

The court concludes that plaintiffs Bacon and Harden have failed to show that they could prove their claims of discrimination under a disparate impact theory.

IV. Limitations Defense

In addition to arguing that it is entitled to summary judgment on the merits of the plaintiffs' claims, the defendant

argues in the alternative that the scope of the claims advanced by plaintiffs Bacon and Harden should be confined to the alleged acts of discrimination which occurred within the relevant limitations periods applicable to their claims. The statute of limitations in Ohio for actions filed under §1981 is two years. *Harris v. Board of Educ. of Columbus, Ohio, City School Dist.*, 798 F.Supp. 1331, 1342 (S.D.Ohio 1992). The statute of limitations for plaintiffs' claims under § 4112.02 is six years. Ohio Revised Code § 2305.07; *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.*, 70 Ohio St.3d 281, 638 N.E.2d 991 (1994).

A Title VII plaintiff must file a charge of discrimination with the EEOC within one hundred and eighty days of the occurrence of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e) ; *E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107 (1988). Where the complainant files a complaint with a state agency in a deferral state, such as Ohio, the time limit for filing a charge with the EEOC is extended to three hundred days. *Alexander v. Local 496, Laborers' Intern. Union*, 177 F.3d 394, 407 (6th Cir. 1999). The limitations period for Title VII actions "begin to run in response to discriminatory acts themselves, not in response to the continuing effects of past discriminatory acts." *Dixon v. Anderson*, 928 F.2d 212, 216 (6th Cir. 1991) (emphasis in original) (citing *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980)) .

The time limits for filing a Title VII action are not jurisdictional but are in the nature of a statute of limitations, which may be subject to equitable tolling. *Brown v. Crowe*, 963 F.2d 895 (6th Cir. 1992); *Brown v. Mead Corp.*, 646 F.2d 1163 (6th Cir. 1981). However, the Supreme Court has cautioned against reading the timely filing requirement out of Title VII through liberal application of the doctrine of

equitable tilling, and has approved the use of equitable principles only under limited circumstances. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984).

Bacon filed his charge of discrimination with the EEOC on May 12, 1999. Thus, the limitations period for his Title VII claim extends back three hundred days from that date to July 17, 1998. He filed a complaint with this court on August 17, 1999. The limitations period on his § 1981 claim extends back two years to August 17, 1997, and the limitations period on his Ohio law claim encompasses conduct occurring after August 17, 1993.

Harden filed his charge of discrimination with the EEOC on February 18, 2000. Therefore, his Title VII claim extends back three hundred days from that date to April 23, 1999. He was added as a plaintiff in the first amended complaint filed on February 18, 2000. The limitations period on his § 1981 claim extends back two years from that date to February 18, 1998, and the limitations period on his Ohio law claim includes conduct dating back to February 18, 1994.

The plaintiffs argue that the limitations periods applicable to their claims should be extended under the continuing violations doctrine. The continuing violation doctrine creates an equitable exception to the Title VII time limits when the unlawful behavior is deemed ongoing, and allows a plaintiff to allege otherwise time-barred acts. *Provencher v. CVS Pharmacy, Div. of Melville Corp.*, 145 F.3d 5, 14 (1st Cir. 1998). The purpose of this doctrine is to permit the inclusion of acts whose character as discriminatory acts was not apparent at the time they occurred. *Speer v. Rand McNally & Co.*, 123 F.3d 658, 663 (7th Cir. 1997); *Martin v. Nannie & Newborns, Inc.*, 3 F.3d 1410, 1415 n. 6 (10th Cir. 1993). There is no continuing violation unless it would have been

unreasonable to expect the plaintiff to sue before the time period ran on the defendant's conduct. *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d 1164, 1166 (7th Cir. 1996). See also *Jackson v. Quanex Corp.*, 191 F.3d 647, 668 (6th Cir. 1999) (continuing violation recognized where the plaintiff reasonably did not become aware of the need to vindicate her rights until after some time elapsed and she discovered she was the victim of a continuing policy or pattern of discrimination); *Conlin v. Blanchard*, 890 F.2d 811, 815 (6th Cir. 1989) (holding in § 1983 case that to allege a continuing violation with regard to employment decisions, a court is to look at what should have alerted the average lay person to protect his rights).

There are two categories of continuing violations recognized by the Sixth Circuit: a series of related discriminatory acts (the serial violation) and an established policy of discrimination (the systemic violation). *Alexander*, 177 F.3d at 408. The first category of continuing violations arises where the employer commits a series of illegal acts, at least one of which occurs within the limitations period, that is, "where there is some evidence of present discriminatory activity giving rise to a claim of a continuing violation" *Dixon*, 928 F.2d at 216. See also *Webb v. Cardiothoracic Surgery Associates of North Texas, P.A.*, 139 F.3d 532, 537 (5th Cir. 1998) (plaintiff must prove a series of related acts); *Haithcock v. Frank*, 958 F.2d 671, 677-78 (6th Cir. 1992) (continuing violation occurs where there is an ongoing and interconnected series of discriminatory acts, one of which falls within the limitations period).

The plaintiffs' claims of disparate treatment in promotion fall into this first category. Courts have frequently held that denials of promotions are discrete employment actions, which constitute isolated occurrences rather than a continuing

violation. *See, e.g., High v. University of Minnesota*, 236 F.3d 909 (8th Cir. 2000) (continuing violation doctrine not applicable to discrete acts such as failure to promote); *Stolzenburg v. Ford Motor Co.*, 143 F.3d 402, 405 (8th Cir. 1998) (denials of promotions constituted discrete employment actions not part of a continuing violation); *Huckabay v. Moore*, 142 F.3d 233, 239-40 (5th Cir. 1998) (discrete failures to promote were isolated occurrences that should have put the employee on notice that a claim of discrimination had accrued and were not continuing violations); *Rush v. Scott Specialty Gases, Inc.*, 113-F.3d 476, 483-84 (3d Cir. 1997) (failure to promote claim a discrete instance of alleged discrimination not susceptible to continuing violation analysis); *Dasgupta v. University of Wisconsin*, 121 F.3d 1138, 1139-40 (7th Cir. 1997) (failure to promote claims were clear instances of discrimination, not continuing violations); *Jones v. Merchants Nat'l Bank & Trust Co. of Indianapolis*, 42 F.3d 1054, 1058 (7th Cir. 1994) (each promotion denied the plaintiff was a discrete decision; each time the plaintiff knew she did not receive the promotion and that another person did).

The evidence here shows no more than a series of isolated failures to award positions to the plaintiffs. There is no evidence that these decisions were interconnected in any way. For example, there is no evidence that the promotion decisions were made by the same supervisors under similar circumstances. Further, each failure to promote where the position was awarded to a nonminority should have alerted the plaintiffs that they were the victims of discrimination.[19] The

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[19] In this regard, the court notes that plaintiff Bacon, as early as January 30, 1994, believed that the defendant discriminated in the award of promotions. In his 1993 associate self-progress report, he commented that the defendant should "promote more blacks instead

record fails to show that the serial doctrine of continuing violations would save the plaintiffs" untimely disparate treatment claims.

The second category of continuing violations arises where there is a longstanding and demonstrable policy of discrimination. *Dixon*, 928 F.2d at 217. Unrelated incidents of discrimination will not suffice to invoke this exception; rather, there must be a continuing overarching policy of discrimination. *Haithcock*, 958 F.2d at 677-78 (continuing violation occurs where there is an ongoing and interconnected series of discriminatory acts, one of which falls within the limitations period). This type of violation occurs where a longstanding and continuous policy of discrimination is shown to exist in regard to general practices or policies such as hiring, promotion, training or compensation. *Provencher*, 145 F.3d at 14; *Haithcock*, 958 F.2d at 678. There is no continuing violation where the plaintiff is complaining of a series of discrete and separate acts that, at best, are separate incidents of discrimination and are not sufficient to establish an overarching policy of discrimination. *LRL Properties v. Portage Metro Housing Auth.*, 55 F.3d 1097, 1106 (6th Cir. 1995). "Systemic violations are said to arise from discriminatory policies" and are "recognized rarely, usually in instances of a discriminatory promotion, hiring, training, Or compensation system where direct evidence, statistics or other evidence demonstrate the discriminatory effects of that policy." *Megwinoff v. Banco Bilbao Vizcaya*, 233 F.3d 73, 76 (1st Cir. 2000)(assertion of general policy of discrimination combined with list of alleged discriminatory acts as evidence

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of cloaking behind Jim Crowism established to deter black advance." Defendant's Memorandum Contra Class Certification, Ex. II.

of discriminatory employment policy not sufficient to sustain a systemic continuing violation claim).

The evidence is insufficient to show that the plaintiffs' claims of disparate treatment in promotion or their general allegations of a pattern or practice could constitute a systemic violation. However, the plaintiffs' disparate impact claims under Title VII and Chapter 4112 which identify specific promotion criteria as allegedly having a disparate impact on African-Americans would fall within the concept of a systemic continuing violation.

In order to invoke the serial "continuing violation" theory, the plaintiff must show that one of the discriminatory acts occurred within the limitations period. *Alexander*, 177 F.3d at 408; *Dixon*, 928 F.2d at 216 (at least one of the discriminatory acts in a series of related discriminatory acts must have occurred within the relevant limitations period).

The defendant argues that plaintiff Bacon cannot extend the limitations period for his Title VII claim in regard to the failure to promote him in MMP Assembly because there were no promotions to team leader or production staff in MMP Assembly during the Title VII statutory limitations period for filing a charge, between July 17, 1998 and May 12, 1999. See *Mack v. Great Atlantic & Pacific Tea Co.*, 871 F.2d 179, 182-83 (1st Cir. 1989); *Jewett v. ITT Corp.*, 653 F.2d 89, 92-93 (3d Cir. 1981) (reversing verdict for plaintiff where no specific promotion denied during charge period). One person, Lance Soliday, was promoted to a position in the purchasing department during this time period in November of 1998, effective December 17, 1998, but the evidence does not reveal this person's race, see Defendant's Motion for Summary Judgment on Bacon Claims, Ex. A, so there is no evidence that plaintiff Bacon can establish a prima facie case of

discrimination in regard to this position. Plaintiff Bacon has not shown that he suffered an act of disparate treatment in promotion within the Title VII charge period so as to warrant the application of the continuing violations doctrine to those claims.

Defendant states that between April 23, 1999 and February 18, 2000, the charge period relevant to plaintiff Harden's Claims, he was not eligible for promotion to team leader in MAP Assembly because he had never completed a team leader promotion pool interest form. Therefore, plaintiff Harden has not shown that he was qualified for or applied for any of those positions. Defendant further notes that there were no promotions from the quality promotion pool during Harden's Title VII charge period. Harden has not shown that the continuing violations doctrine should apply to his disparate treatment claims.

In order to apply the continuing violations doctrine to a systemic violation, it must be shown that the discriminatory policy or practice continued into the limitations period, as manifested by at least one forbidden discriminatory act pursuant to the policy. *Hull v. Cuyahoga Valley Joint Vocational School Dist. Bd. of Ed.*, 926 F.2d 505, 510-11 (6th Cir. 1991) (doctrine applies where plaintiff challenges unlawful practice that continues into limitations period); *Dixon*, 928 F.2d at 217-218 (plaintiffs could not establish a systemic continuing violation if they failed to show a specific manifestation of the alleged discriminatory policy within the limitations period).

Although the First Circuit has held that a systemic continuing violation claim requires no identifiable act of discrimination in the limitations period, *Provencher*, 145 F.3d at 14, that circuit has also held that the plaintiff must show

that he or she has been harmed by the application of the discriminatory policy or practice, and has commented on the plaintiff's lack of evidence that he or she was injured by that policy during the limitations period. See *Lawton v. State Mutual Life Assurance Co. of America*, 101 F.3d 218, 222 (1st Cir. 1996) (noting lack of evidence that plaintiff herself was injured by policy during three hundred days preceding filing of administrative complaint); *Muniz-Cabrero v. Ruiz*, 23 F.3d 607, 610-11 (1st Cir. 1994) (noting that plaintiff failed to allege that he suffered from political discrimination in year before he filed suit under 42 U.S.C. §1983 so as to warrant application of systemic violation theory). In *Conlin*, 890 F.2d at 815, the Sixth Circuit held that denials of promotion to persons other than the plaintiffs during the limitations period were insufficient to bring the plaintiffs' disparate impact claims concerning the employer's affirmative action policy within the continuing violations doctrine. *Cf. Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (plaintiffs asserting individual claims under Fair Housing Act cannot invoke continuing violation doctrine based on unrelated injury to other persons during limitations period).

The plaintiffs rely on *Phillips v. Cohen*, 2001 WL 92146 (unreported) (6th Cir. Jan. 22, 2001), in which the court found that evidence submitted in a proposed class action concerning the failure to promote a class member other than the named class representative during the limitations period was sufficient to avoid summary judgment on the issue of the applicability of the systemic continuing violation doctrine to the class disparate impact claims.[20] However, since the court

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[20] Although the *Phillips* court discussed one issue raised in *Conlin*, that being whether plaintiffs who have notice of an employer's discriminatory policies may invoke the continuing violation doctrine, it did not address the Conlin holding that injuries to other

did not certify a class of production associates in the instant case, this case involves only individual claims and not class allegations.

This court concludes that in a case involving individual claims which is not a class action, the plaintiff complaining of systemic violation should have to demonstrate that he or she was harmed by the alleged illegal policy or practice during the limitations period in order to take advantage of the continuing violations doctrine. However, in the alternative, this court has also addressed the question of whether the defendant is entitled to summary judgment on the merits of the plaintiffs' disparate impact claim. Further, even if it is assumed that the plaintiffs can pursue otherwise time-barred disparate impact claims upon a showing that some other person was injured by an alleged illegal policy or practice during the limitations period, the application of the continuing violations doctrine would not relieve plaintiffs of the requirement of proving that the policy or practice resulted in discrimination and that they themselves were injured by the practice or policy.[21]

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employees allegedly caused by these policies during the limitations period could not be used by the plaintiffs to satisfy that requirement of the continuing violations doctrine.

[21] The court also notes that since the limitations period for the plaintiffs' Ohio law Claims is six years, it is not clear that confining the plaintiffs' Title VII claims to the three-hundred-day charge period would have much impact as a practical matter.

V. Conclusion

In accordance with the foregoing, the defendant's motions for summary judgment on the claims of plaintiffs Bacon (docket #133) and Harden (docket # 135) are hereby granted.

VI. Other Pending Motions

The defendant's motion (docket #153) for leave to file a reply memorandum in excess of twenty pages is granted.

The defendant's motion (docket #155) for approval of the defendant's proposed jury questionnaire is denied as moot. This motion may be renewed in the event that a trial is required on the claims of the remaining plaintiffs in this case.

The defendant's motion to exclude at trial the opinions of plaintiffs' experts, Dr. James McClave and Dr. Philip Way, is denied as moot. This motion may be renewed in the event that a trial is required on the claims of the remaining plaintiffs in this case. As the foregoing opinion indicates, this court has considered the evidence offered by Dr. McClave and Dr. Way in determining whether summary judgment is warranted on the claims of plaintiffs Bacon and Harden. In doing so, the court has assumed, *arguendo*, for purposes of these summary judgment motions, that these expert opinions can properly be considered under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993), and the court's consideration of this evidence should not be construed as a final ruling on their admissibility. **It is so ordered.**

/s/ _____
James L. Graham
United States District Judge

Date: April 30, 2001

APPENDIX E

SELECTED STATUTORY PROVISIONS

42 USCS § 2000e-2 (2004)

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion,

sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices. It shall be an unlawful employment practice for a labor organization–

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religions.

Notwithstanding any other provision of this title [42 USCS §§ 2000e *et seq.*], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations. As used in this title [42 USCS §§ 2000e *et seq.*], the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by

final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National security. Notwithstanding any other provision of this title [42 USCS §§ 2000e *et seq.*], it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if--

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions. Notwithstanding any other provision of this title [42 USCS §§ 2000e *et seq.*], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate

because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title [42 USCS §§ 2000e *et seq.*] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Businesses or enterprises extending preferential treatment to Indians. Nothing contained in this title [42 USCS §§ 2000e *et seq.*] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance. Nothing contained in this title [42 USCS §§ 2000e *et seq.*] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 USCS §§ 2000e *et seq.*] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any

employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases.

(1)

(A) An unlawful employment practice based on disparate impact is established under this title only if--

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)

(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the

complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

(3) Notwithstanding any other provision of this title [42 USCS §§ 2000e *et seq.*], a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores. It shall be an unlawful employment practice for a respondent, in

connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title [42 USCS §§ 2000e *et seq.*], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders.

(1)

(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had--

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to--

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.

42 USCS § 2000e-5

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices. The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title [42 USCS §§ 2000e-2 or 2000e-3].

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause. Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the

"respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings. In the case of an alleged unlawful employment practice occurring in a State, or

political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission. In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law),

unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency.

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title [42 USCS §§ 2000e *et seq.*] (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into

a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge

(A) by the person claiming to be aggrieved or

(B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining

order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title [42 USCS §§ 2000e *et seq.*]. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)

(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back

pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS § 2000e-3(a)].

(B) On a claim in which an individual proves a violation under section 703(m) [42 USCS § 2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m) § 42 USCS § 2000e-2(m)]; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of 29 USCS §§ 101 *et seq.* not applicable to civil actions for prevention of unlawful practices. The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U. S. C.§§ 101-115), shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders. In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this

section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals. Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) Attorney's fee, liability of Commission and United States for costs. In any action or proceeding under this title [42 USCS §§ 2000e *et seq.*] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

FEDERAL RULE OF CIVIL PROCEDURE 23

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1)

(A) When a person sues or is sued as a representative of a class, the court must--at an early practicable time--determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)

(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
  the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass

treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)

(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)

(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).